Supreme Court, U.S.

(1)

95-2063 JUN 24 '96

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

CHERRY HILLS RESORT DEVELOPMENT COMPANY,
a Colorado limited Partnership,

Petitioner,

vs.

THE CITY OF CHERRY HILLS VILLAGE,

Respondent.

Petition for a Writ of Certiorari to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

JAMES B. RHOADS
Counsel of Record
JAMES K. KREUTZ
ROD J. PERA
JAMES B. RHOADS, P.C.
Attorneys for Petitioner
Suite 1780 Riverwood
3350 Cumberland Circle, N.W.
Atlanta, Georgia 30339
(404) 897-1800

197 PP

QUESTIONS PRESENTED

I. When a city is held by its state's highest court to have "abused its discretion" and to have "exceeded its jurisdiction" by imposing conditions on a developer's land development permit not authorized by the city's zoning ordinance, may the city avoid "taking" liability under the Fifth Amendment because the developer could have developed its property in accordance with the unlawful conditions?

II. Where a city's unlawful permit conditions "completely eliminate the proposed construction of luxury condominiums or apartments" on a 3 acre parcel of land, and "place significant limitations on the development of a proposed hotel and surrounding grounds" on an adjacent 3.9 acre parcel, can a state, consistent with the Fifth Amendment require a developer who had the right to develop the property without such restrictions, to prove in order to recover damages that but for the illegal conditions, the project as planned would have succeeded?

III. In an action brought under 42 U.S.C. § 1983, is a person who is deprived of a federally recognized property right by a city acting under color of law entitled to recover the out-of-pocket losses it incurred in attempting legitimately to develop that property right?

IV. When a city is held by its state's highest court to have "abused its discretion" and to have "exceeded its jurisdiction" by imposing on a developer's land development permit conditions not authorized by the city's zoning ordinance, may the city avoid "taking" liability under the Fifth Amendment because such unlawful conditions are

"rationally related" to the general purpose of the zoning ordinance without having made any specific showing as to how they are related?

V. When a city is held by its state's highest court to have "abused its discretion" and to have "exceeded its jurisdiction" by imposing conditions on a developer's land development permit not authorized by the city's zoning ordinance, may the city avoid liability under 42 U.S.C. § 1983 because at trial the developer could not prove the city acted "recklessly or with gross negligence" in imposing such unlawful conditions?

LIST OF PARTIES

The names of all parties presently in the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. The Temple H. Buell Trust and it trustees Temple Buell and Richard Nathan withdrew from the case in 1991, and Boulineau Development Company and Fred Boulineau Associates, Inc. were predecessors to Petitioners. Fortune Investments of Colorado, Inc. is the general partner and Fred M. Boulineau and Stephen L. Tucker are limited partners of Petitioner. Individual past and present members of City Council of Cherry Hills Village and the City Council itself were dismissed from the proceedings prior to the entry of the judgment sought to be reviewed in this case.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	iii
Table of Contents	iv
Table of Citations	vi
Opinions Below	1
Statement of Jurisdiction	2
Statutes and Ordinances Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6

I. When a city is held by its state's highest court to have "abused its discretion" and to have "exceeded its jurisdiction" by imposing conditions on a developer's land development permit not authorized by the city's zoning ordinance, the city may not avoid "taking" liability under the fifth amendment because petitioner could have developed its property in accordance with the unlawful conditions. 7

II. Where a city's unlawful permit conditions "completely eliminate the proposed construction of luxury condominiums or apartments" on a 3 acre parcel of land, and "place significant limitations on the development of a proposed hotel and

CONTENTS

Page

surrounding grounds" on an adjacent 3.9 acre parcel, a state may not, consistent with the fifth amendment, require a developer who had the right to develop the property without such restrictions, to prove in order to recover damages that but for the illegal conditions, the project as planned would have succeeded.. 11

III. In an action brought under 42 U.S.C. § 1983, a person who is deprived of a federally recognized property right by a city acting under color of law is entitled to recover the out-of-pocket losses it incurred in attempting legitimately to develop that property right... 14

IV. When a city is held by its state's highest court to have "abused its discretion" and to have "exceeded its jurisdiction" by imposing on a developer's land development permit conditions not authorized by the city's zoning ordinance, the city may not avoid "taking" liability under the fifth amendment merely because such unlawful conditions are "rationally related" to the general purpose of the zoning ordinance if the city has made no specific showing as to how they are related 16

V. When a city is held by its state's highest court to have "abused its discretion" and to have "exceeded its jurisdiction" by imposing conditions on a developer's land development permit not authorized by the city's zoning ordinance, the city may not avoid liability

CONTENTS

Page

under 42 U.S.C. § 1983 because at trial, petitioner could not prove the city acted "recklessly or with gross negligence" in imposing such unlawful conditions. 24

Conclusion 27

TABLE OF CITATIONS

Cases Cited:

Supreme Court of the United States:

Agins v. Tiburon, 447 US 255, 260 (1980) ... 9, 22, 51a, 52a

Dolan vs. City of Tigard, 512 U.S. ___, 114 S.Ct. 2309, 65 L. Ed.2d 106 (1994) 6, 8, 10, 11, 13, 20, 21,22, 23, 27

Ehrich v. City of Culver City, 512 U.S. ___, 114 S.Ct. 2731, 129 L.Ed.2d 854 (1994) 6

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 US 504 (1987) 17, 41a, 47a, 65a

Kaiser Aetna v. United States, 444 U.S. 164, (1979) 15

Lucas v. South Carolina Coastal Council, 503 US1003 (1992)..... 17, 21, 22, 27, 46a, 47a, 51a

CONTENTS

Page

Memphis Community School District v. Stachura, 477 U.S. 299 (1986) 14

Nollan vs. California Coastal Commission, 483 U.S. 825 (1987) 6, 7, 9, 10, 11, 13, 18, 19, 21, 27, 45a, 47a, 52a, 53a

Olson v. United States, 292 U.S. 246 (1933) 17

Owen v. City of Independence, 445 U.S. 622 (1980) 25

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 9, 21, 47a

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 17

United States v. General Motors Corp. 323 U.S. 373 (1944) 17

United States Courts of Appeals:

Littlefield v. City of Afton, 785 F.2d 596, at 600 and 603-608 (8th Cir. 1986) 24, 61a, 62a

Parks v. Watson, 716 F.2d 646, at 656-657 (9th Cir. 1983) 26

PFZ Properties, Inc., v. Rodriguez, 928 F. 2d 28 (1 Cir. 1991), cert. granted in part 502 U.S. 956, 112 S.Ct. 414, 115 L. Ed. 2d 435 (1991); cert. dismissed as improvidently granted, 503 U.S. 257,

CONTENTS

Page

112 S.Ct. 1151, 117 L. Ed. 2d. 400 (1992); rehearing denied, 504 U.S. 935, 112 S. Ct. 2001. 118 L. Ed. 2d 597 (1992) 7, 24

Rogin v. Bensalem Townships, 616 F.2d 680 (3d Cir. 1980), cert. denied, 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed. 223 (1981) 26

Scott v. Greenville County, 716 F.2d 1409, at 1418-21 (4th Cir. 1983) 26

Scudder v. Town of Greendale, 704 F.2d 999 (7th Cir. 1983) 26

Shelton v. City of College Station, 754 F.2d 1251 (5th Cir. 1985) 26

Colorado Supreme Court:

City of Northglenn v. Grynberg, 846 P.2d 175, 179 (Colo.1993) 22, 43a, 55a, 57a, 58a, 59a

Statutes Cited:

42 U.S.C. § 1983
.i, ii, v, vi, 3, 5, 7, 14, 15, 24, 25, 26, 27, 5a, 7a, 59a, 62a

Other Authorities Cited:

Nichols, *Law of Eminent Domain*, §§ 5.01, *et. seq.* 12

No.

In The

Supreme Court of the United States

October Term, 1996

CHERRY HILLS RESORT DEVELOPMENT COMPANY,
a Colorado limited Partnership,

Petitioner,

vs.

THE CITY OF CHERRY HILLS VILLAGE,

Respondent.

Petition for a Writ of Certiorari to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The final order of the Colorado Supreme Court denying certiorari in this case is unreported and reproduced at Appendix (App.), 1a-2a. The opinion of the Colorado Court of Appeals from which certiorari to the Colorado Supreme Court was sought is unreported and is reproduced at App.,

3a-7a. The opinion of the District Court of Arapahoe County awarding costs to Petitioner is unreported and is reproduced at App., 8a-15a. The trial opinion of the District Court of Arapahoe County affirmed by the Colorado Court of Appeals is unreported and is reproduced at App., 16a-80a. The Order of Mandate of the Colorado Court of Appeals remanding the case for trial to the District Court of Arapahoe County is unreported and reproduced at App., 100a-101a. The Order of Mandate of the Colorado Supreme Court remanding the case with direction to the Colorado Court of Appeals is unreported and reproduced at App.,102a-103a. The opinion of the Colorado Supreme Court reversing the Colorado Court of Appeals on the merits and ordering this case remanded for trial before the District Court of Arapahoe County is reported at 790 P. 2d 827 (1990), and is reproduced at App., 104a-120a. The opinion of the Colorado Court of Appeals on the merits, reversed by the Colorado Supreme Court, is unreported and is reproduced at App., 121a-126a. The opinion of the Colorado Supreme Court reversing the Colorado Court of Appeals on jurisdictional grounds is reported at 757 P. 2d 622 (1988), and is reproduced at App., 127a-142a. The opinion of the Colorado Court of Appeals reversed by the Colorado Supreme Court is reported at 720 P. 2d 992 (1986), and is reproduced at App., 143a-147a. The original opinion of the District Court of Arapahoe County in 1984 is unreported and is reproduced at App., 148a-159a.

STATEMENT OF JURISDICTION

The decision of the Colorado Supreme Court, review of which is sought in this petition, was entered on March 25, 1996. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[n]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part, "[n]or shall any state deprive any person of life, liberty, or property, without due process of law."

The statute at issue is 42 U.S.C. § 1983, which provides:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage of any State, Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

The portions of the ordinance at issue in the Zoning Code of The City of Cherry Hills Village are set forth verbatim in the Appendix at 150a and 151a.

STATEMENT OF THE CASE

In 1980, the Petitioner, Cherry Hills Resort Development Company, entered into an agreement with the owner, the Temple H. Buell Trust, to lease and develop 68.8 acres of land in the City of Cherry Hills Village, Colorado ("Agreement to Lease"). In July 1982, Petitioner submitted two alternative development plans to the Cherry Hills Village

City Council. The plans were identical except that the first plan required the City to permit a golf course on a portion of the property zoned R-1 or to rezone that area as RA-1. The second plan placed the golf course on a portion of land which was already zoned RA-1, thus requiring no further zoning action. Both plans proposed a 600-room hotel on a 3.9 acre hotel parcel, and a 200-room structure or structures committed either to condominiums or apartments on a 3.0 acre condominium parcel.

In September 1982, the city council passed a resolution approving the second development plan, but made its approval subject to twenty restrictions and conditions. As found by the Colorado Supreme Court, "...[t]wo of these conditions completely eliminated the proposed construction of luxury condominiums or apartments. The remaining conditions placed significant limitations on the development of the proposed hotel and surrounding grounds." App., 108a.

The Petition herein sought court review of the City's action, and following a tortuous path through the trial and appellate system of Colorado, in 1990 the Colorado Supreme Court ruled that the City had "exceeded its jurisdiction" and had "abused its discretion" when it prohibited any development on developer's condominium parcel and required Developer, as a condition of approval of its hotel parcel, to pay the City a half-million dollars, to negotiate with adjacent property owners who opposed the project to agree on sound and vision impact improvements, and to submit evidence satisfactory to the City of its financial ability to complete the project. App., 104a-120a.

The case was remanded to the trial court. In January, 1992, Petitioner timely filed an amended complaint stating an inverse condemnation count alleging that the City's actions

constituted a taking under Fifth Amendment. In addition, Petitioner stated a claim under 42 U.S.C. § 1983. Petitioner requested damages under each of these federal claims. App., 81a-99a. The City timely filed its Answer denying any liability. App., 71a-80a.

In 1992, at the bench trial held on remand, Petitioner established, without rebuttal, that its development rights for both the condominium parcel and the hotel parcel under its Agreement to Lease had a fair market value of over twenty million dollars in 1982, and had no fair market value in 1990, the time of the Supreme Court decision finally invalidating the unlawful restrictions and conditions. Petitioner also established, again, without rebuttal, it had out-of pocket costs of nearly eight million dollars expended in the attempted development of the project as it was entitled.

In 1993, the trial court (Judge Kenneth K. Stuart) issued his opinion. In it, he recognized that "the logical tendency in the case at this point is to conclude that since the city imposed invalid restrictive conditions on the Plaintiff's development plan, the Plaintiff must be entitled to damages." App., 17a. However, he ruled against Petitioner on all counts, concluding variously: a. that there was no unconstitutional taking because Petitioner could have developed the property as restricted and conditioned; b. Petitioner suffered no damages because it could not develop the property either with or without the restrictions and, in any event, it presented no evidence as to the value of the project as approved by the City which, the court held, was fatal to the damages claim; c. Petitioner could not recover out-of- pocket costs under any theory of liability; d. the City acted reasonably in imposing the restrictions, even though it was not authorized to do so under its ordinance, since the restrictions furthered the objectives of the ordinance; and, e. the City acted in good

faith. App., 17a-69a.

The Colorado Court of Appeals affirmed Judge Stuart's lengthy opinion, but limited its opinion to the issue of damages. Characterizing the trial court's opinion as "exhaustive, detailed and well reasoned," the court of appeals noted Petitioner advanced arguments before it Petitioner had presented before the trial court in an attempt to have the city action declared to constitute a "taking" and to have violated petitioner's federal right to substantive due process. It then specifically stated it did not "...reach these issues because Plaintiff's failure to establish that its damages are traceable to, and a direct result of, the City's invalid conditions preclude its recovery of any but nominal damages under all of its various claims." App., 6a. The Colorado Supreme Court denied certiorari without opinion. App., 1a.-2a.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided on important federal question in a way that conflicts with relevant decisions of this Court. Both of these grounds for review are present in this case.

This case presents the opportunity to answer significant and recurring questions of the power of government to restrict and condition the use of private property, and, like *Ehrlich v. City of Culver City,* 512 US___, 114 S.Ct., 129 L. Ed. 2d 854 (1994) 2731, raises issues related to the application of this Court's decisions in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) and *Dolan v. City of Tigard,* 510 U.S. ___, 114 S.Ct. 2309, 65 L. Ed.2d 106 (1994).

It also raises issues surrounding "substantive due process" claims in land use cases brought under 42 U.S.C. § 1983 this Court sought to resolve in its review of *PFZ Properties, Inc. v. Rodriguez* 928 F. 2d 28 (1 Cir. 1991), *cert. granted in part* 502 U.S. 956 (1991); *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992); *rehearing denied*, 504 U.S. 935, (1992).

Finally, we believe this case demonstrates the seriousness with which Justice Scalia's observation in *Nollan*, should be taken: "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."

I. WHEN A CITY IS HELD BY ITS STATE'S HIGHEST COURT TO HAVE "ABUSED ITS DISCRETION" AND TO HAVE "EXCEEDED ITS JURISDICTION" BY IMPOSING CONDITIONS ON A DEVELOPER'S LAND DEVELOPMENT PERMIT NOT AUTHORIZED BY THE CITY'S ZONING ORDINANCE, THE CITY MAY NOT AVOID "TAKING" LIABILITY UNDER THE FIFTH AMENDMENT BECAUSE PETITIONER COULD HAVE DEVELOPED ITS PROPERTY IN ACCORDANCE WITH THE UNLAWFUL CONDITIONS.

This is the precedent established by the trial court's decision, as affirmed by the Colorado Appellate and Supreme Courts.

At the outset of its opinion, that court notes that "Resolution 16 [of the City] approved the project subject to conditions and the Petitioner was legally able, from September 1982 on, to develop the project consistent with those

conditions." App., 23a.

Then, the trial court held in the section of its opinion regarding damages:

> The most telling fact concerning the request for damages is that Plaintiff had the right to develop the project without condominiums from the passage of Resolution 16 [in 1982] until the decision in CHRDC II [in 1990]. In 1983 the Plaintiff believed that the project as approved was financeable and workable, i.e., economically feasible. Nonetheless, the Plaintiff chose to pursue the entire project and not to pursue the actual development of that portion of the project that had been approved. App., 64a.

As a theoretical proposition, all of this may be true, but it is also irrelevant since the conditions were conclusively found to have been illegal by the Colorado Supreme Court. From 1982 on, Petitioner was legally *entitled*, although not legally able, to develop its property free of the half million dollar exaction demanded by the City, free of the other unlawful conditions and for the purpose of building condominiums.

Certainly, in *Dolan, supra*, Mrs. Dolan *could* have developed her property by dedicating a portion of it lying within the 100-year flood plain for storm drainage and by dedicating an additional 15-foot strip adjacent to the flood plain as a pedestrian/bicycle parkway---but that did not mean that the exactions and conditions did not constitute a taking in violation of the Fifth and Fourteenth Amendments for which just compensation had to be paid. The state is not free

to take property rights by regulation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414- 415 (1922) even where some economically viable use of the property may remain intact. As this Court made clear in *Nollan*, "As we have said on numerous occasions, the Fifth Amendment is violated when a land-use regulation does not substantially advance legitimate state interests *or* denies an owner economically viable use of his land" (Quoting from *Agins v. Tiburon*, 447 US 255, 260 (1980). Here both tests are failed by the city, and there is no suggestion that a state can take property rights from a person arbitrarily, without jurisdiction, so long as some other use may be made of the property subject to the unlawful conditions.

The trial judge saw the major issue in this case as being "whether the restrictive conditions placed on the City's approval prevented the Petitioner from proceeding with the development and whether Petitioners have suffered any actual damages as a result of the City's action." App., 24a.

These are false issues: The Colorado Supreme Court concluded that the City's restrictions were unlawful and interfered with Petitioner's right to make economical and beneficial use of its property without being fettered by the City's unlawful conditions. This being so, of what possible legal significance could the inquiry into Petitioner's ability to develop the property subject to unlawful conditions be? Only to confuse the issue and make it appear that the Petitioner suffered no damages by constructing the false syllogism that since Petitioner could have developed its property subject to unlawful conditions, and since Petitioner did not succeed in so developing its property, therefore Petitioner was not damaged.

But Petitioner was entitled for an eight-year period to develop its property without unlawful restrictions, i.e., to include luxury condominiums and without paying the City $500,000, and without the other unlawful restrictions, and this legal property right was arbitrarily taken from it without just compensation.

By focusing on whether the Petitioner could have developed its property subject to the unlawful restrictions the courts below managed to avoid the real issues: whether the City had a legitimate state interest which was advanced by the conditions, and whether the City made the required individualized determination that the exactions, conditions and restrictions were related both in nature and extent to the impact of the proposed development. See *Nollan, supra*, and *Dolan, supra*.

The effect of the decisions of the courts below trivializes the impact of the conditions imposed by the City. For example, in discussing the inability of Petitioner to secure financing, the trial court discusses the lack of development rights by stating ". . . This was not a genuine issue. The Petitioner could have developed the property after Resolution 16." App., 28a.

The trial court notes that the testimony supported the Petitioner's position that the conditions imposed by the City were an obstacle to financing, but then ignores this point entirely in its decision. App., 29a. Rather, the trial court finds that ". . . Plaintiff was not shown by a preponderance of the evidence that it would ever have been able to obtain financing" App., 34a-35a, even though it was, of necessity, working with unlawful conditions and restrictions on its right to use its property.

Finally, the trial court rested its finding of a lack of foundation for Petitioner's evidence on damages as follows:

> There has been no evidence of the fair market value of the opportunity to develop the land as it had been approved. *There was evidence of the value of the Agreement to Lease* [the full development rights in 1982], but none as to the value of the project *as approved.* App., 65a.

Therefore, this Court must grant certiorari to give substance to its teachings in *Nollan* and *Dolan.*

II. WHERE A CITY'S UNLAWFUL PERMIT CONDITIONS "COMPLETELY ELIMINATE THE PROPOSED CONSTRUCTION OF LUXURY CONDOMINIUMS OR APARTMENTS" ON A 3 ACRE PARCEL OF LAND, AND "PLACE SIGNIFICANT LIMITATIONS ON THE DEVELOPMENT OF A PROPOSED HOTEL AND SURROUNDING GROUNDS" ON AN ADJACENT 3.9 ACRE PARCEL, A STATE MAY NOT, CONSISTENT WITH THE FIFTH AMENDMENT, REQUIRE A DEVELOPER WHO HAD THE RIGHT TO DEVELOP THE PROPERTY WITHOUT SUCH RESTRICTIONS, TO PROVE IN ORDER TO RECOVER DAMAGES THAT BUT FOR THE ILLEGAL CONDITIONS, THE PROJECT AS PLANNED WOULD HAVE SUCCEEDED.

The absurdity of the burden placed on Plaintiff to prove the project as planned would have succeeded is demonstrated by the trial court's own observation:

> The Plaintiff has claimed for damages for lost profits. The Plaintiff's ability to make any

> profit on the project can be determined by evaluating the factors identified in the evidence that bear on whether the project could have succeeded.
>
> *This is difficult to do because almost all the evidence focused on the project with condominiums included,* . . . " (emphasis added) App., 35a.

Of course it did, since Petitioner was legally entitled to include condominiums in its project; it was the City that acted unlawfully in excluding them!

The trial judge found the "evidence shows that the project was possible and that success was possible." App., 59a. Then, incredibly, it relied entirely on the evidence that the *project subject to unlawful conditions* could *not* succeed by holding that such evidence does not show that ". . . the project, if approved by the City as it should have been, probably would have been built or probably would have been successful" App., 39a.

Consider the implications of this reasoning. The government, if the trial court's formulation stands, can effectively take a property owner's right to develop his property by imposing unlawful exactions, conditions and restrictions and then, after such exactions, conditions and restrictions are struck down (here after eight years of litigation), avoid paying just compensation by showing that the property owner was unable to develop his property with the illegal conditions attached to it. The property owner is reduced to proving a negative: that if it were not for the illegal conditions it would have been able to develop its property.

Here, Petitioner did just that by proving the value of its Agreement to Lease in 1982—if it had been permitted to proceed—App., 65a, and the essentially worthless value of its interest in 1990, after all illegal restrictions were struck down, but the Court would not accept it. Rather, the court created a reverse "Field of Dreams" defense for the City: "if you *don't* build it, they *won't* come." Petitioner in this case couldn't build its project because of the City's illegal actions and, therefore, since "nobody came," the Court found that Petitioner suffered no damages!

The Colorado courts in this case insist that Petitioner must pay the price for the wrongful acts of the City:

> In 1983, the Plaintiff believed that the project as approved was financeable and workable, i.e., economically feasible. Nonetheless, the Plaintiff chose to pursue the entire project and not to pursue actual development of that portion of the project that had been approved. App., 64a.

But the Petitioner was *legally entitled* to pursue the entire project; it was the City acting under color of law, that abused its discretion and, without jurisdiction, deprived Petitioner of its federally recognized right. Now, the Colorado courts seek to make the Petitioner pay *twice* for being a victim: once because it was unlawfully deprived of its federally protected right and again because it chose to seek redress for those rights rather than to acquiesce and build the project as unlawfully restricted.

This Court, therefore should grant certiorari in this case to make meaningful its holdings in *Nollan* and *Dolan*.

III. IN AN ACTION BROUGHT UNDER 42 U.S.C. § 1983, A PERSON WHO IS DEPRIVED OF A FEDERALLY RECOGNIZED PROPERTY RIGHT BY A CITY ACTING UNDER COLOR OF LAW IS ENTITLED TO RECOVER THE OUT-OF-POCKET LOSSES IT INCURRED IN ATTEMPTING LEGITIMATELY TO DEVELOP THAT PROPERTY RIGHT.

Without rebuttal, Petitioner submitted evidence at trial that it had expended nearly eight million dollars in attempting to develop its project both before and after the unlawful conditions were imposed on its development plan by the city, and sought "reimbursement of [such] out-of-pocket costs for time spent on the project". App., 67a.

The trial court, as affirmed by the Colorado Court of Appeals and the Colorado Supreme Court, held such out-of-pocket costs "could not be awarded under any of the three claims." App., 67a.

At least with respect to Petitioner's claim under 43 U.S.C. § 1983, that holding is clearly contrary to the teachings of this Court in *Memphis Community School District v. Stachura*, 477 U.S. 299, (1986), where it summarized the basic ground rules for awarding damages for violations of constitutional rights in such actions:

> We have repeatedly noted that 42 U.S.C. § 1983 creates a " 'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution" [citations omitted]. Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined

> according to principles derived from the common law of torts. [citations omitted].
>
> Punitive damages aside, damages in tort cases are designed to provide "compensation for the injury caused to plaintiff by defendant's breach of duty." [citations omitted]. To that end, compensatory damages may include *not only out-of-pocket loss and other monetary harms*, but also injuries such as "impairment of reputation..., personal humiliation, and mental anguish and suffering." [citations omitted].

Petitioner is entitled to that of which it was deprived—the value of the opportunity to have developed the property without the burden of the unlawful conditions, for the period from 1982, when those conditions were imposed, until the Colorado Supreme Court struck them down in 1990. During that eight-year period, Petitioner, according to the evidence, spent nearly eight million dollars trying to develop its property. At a minimum, it should be entitled to recover these costs. In the alternative, it should be granted a new trial limited to the issue of just compensation for the unlawful taking of its property rights under the Fifth Amendment and damages for the deprivation of its federally protected property rights pursuant to 42 U.S.C. § 1983.

In 1982, Petitioner had a valuable property right; by the time that right was finally vindicated by the Colorado Supreme Court in 1990, that property right was worthless because the lease under which Petitioner was acting expired. App., 4a.

Petitioner had its property taken; it deserves just compensation either based on the value of the property right in 1982, less its value in 1990, or, alternatively, based on its out-or-pocket losses occasioned by the unlawful taking.

Accordingly, this Court should grant certiorari in this case, vacate the judgment of The Colorado Supreme Court and order that Petitioner recover its out-of-pocket expenses as proved, without rebuttal, at trial.

IV. WHEN A CITY IS HELD BY ITS STATE'S HIGHEST COURT TO HAVE "ABUSED ITS DISCRETION" AND TO HAVE "EXCEEDED ITS JURISDICTION" BY IMPOSING CONDITIONS ON A DEVELOPER'S LAND DEVELOPMENT PERMIT NOT AUTHORIZED BY THE CITY'S ZONING ORDINANCE, THE CITY MAY NOT AVOID "TAKING" LIABILITY UNDER THE FIFTH AMENDMENT MERELY BECAUSE SUCH UNLAWFUL CONDITIONS ARE "RATIONALLY RELATED" TO THE GENERAL PURPOSE OF THE ZONING ORDINANCE IF THE CITY HAS MADE NO SPECIFIC SHOWING AS TO HOW THEY ARE RELATED.

The trial court's opinion, affirmed by the Colorado Appellate and Supreme Courts, held that court was bound by the Colorado Supreme Court's earlier holding in this case that the City's actions were beyond its jurisdiction and an abuse of its discretion and therefore unlawfully prevented Petitioner from developing its property. Nevertheless, the Court held that the issue before it was ". . . whether a governmental regulation which misinterprets a zoning ordinance and therefore deprives an owner of existing

property rights is a *per se* 'taking' under the Constitution" App., 45a.[1]

The trial court begins by acknowledging this Court's decision in *Lucas v. South Carolina Coastal Council*, 503 US 1003 (1992), but notes that Lucas may mean that only an owner who is deprived of 100% of the economic use of the land may recover; an owner who is deprived of 95% of all economic value may recover nothing. App., 46a[2].

---

[1] While the trial court found Petitioner had no standing to bring its inverse condemnation claim, both the Colorado Court of Appeals and the Colorado Supreme Court ignored that ruling. Moreover, the Colorado Supreme Court's finding that City's resolution "adversely affected the developer's property interest in making all economic and beneficial use of the land in question." *Cherry Hills* I, App., 141a, conclusively established that Petitioner had standing to bring its inverse condemnation claim. Any holding to the contrary is, as a matter of federal law, inconsistent with this Court's holdings in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, (1980), *Kaiser Aetna v. United States*, 444 U.S. 164, (1979), *United States v. General Motors Corp.*, 323 U.S. 373, (1944) and *Olson v. United States*, 292 U.S. 246, (1933). *And see generally, Nichols, Law of Eminent Domain*, §§ 5.01, *et. seq.*

[2] Compare the eight-year deprivation of property rights in this case with the situation in *Lucas* where this Court held that the fact that South Carolina amended its Beachfront Management Act to allow for the issuance of special construction permits under certain circumstances did not deprive Petitioner from asserting his taking claims for the two-year period before the amendment. See also, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 US 504, (1987), holding that temporary deprivations of use are compensable under the "takings" clause.

The trial court pays lip service to *Nollan*, *supra*, by noting that compensation is required where the government has conditioned the granting of a building permit on the granting of an easement whose purpose lacked a nexus with the purpose of the ordinance in question App., 47a, but never applies the holding of rationale of *Nollan* to the case at issue. Here, the granting of a permit was conditioned on developer giving up its right to build condominiums *and* on its paying the City a half-million dollars. The trial court, as affirmed by the Colorado Appellate and Supreme Courts, seeks to demonstrate that the restrictions which the Colorado Supreme Court found to have "adversely affected the developer's property interest in making economic and beneficial use of all land in question" did not constitute a taking.

The trial court does this by summarily concluding that three of the invalid conditions (the exaction of a $500,000 payment for off-site intersection improvements, requiring payment for additional fire equipment, requiring Petitioner to negotiate with adjacent property owners to minimize sight and sound impacts) "would probably have little impact on the project." App., 50a. A fourth condition (that Petitioner submit evidence satisfactory to the City that it had the financial ability to complete the project) the trial court dismissed as being of "minimal importance." App., 50a. The court's reasoning is that if Petitioner successfully complied with this condition, it would not have been damaged because the project could have been built, and if Petitioner was *not* able to comply with this condition, it would not have been able to build the project in any event and thus was not "damaged" by the condition. App., 50a-51a.

The Court *does* conclude that the two remaining conditions (no condominiums or luxury residences and no more than 600 hotel units totaling a maximum of 620,000

square feet) ". . . could support a finding of a Constitutional 'taking' . . ." App., 51a. The trial court recognizes that "*Nollan* has some surface similarity to the present case" App., 52a, and that "a land use regulation may constitute a taking if the regulation is not reasonably necessary for the effectuation of a substantial government purpose." App., 52a.

However, the trial court then goes on to make the most incredible statement:

> ...on the one hand, a government has a substantial interest in enforcing its own laws and a resolution which improperly enforces those laws does not advance that government interest. *On the other hand, an interpretation of a zoning ordinance, even when erroneous, serves a government purpose when that interpretation advances the same interest as the zoning ordinance.* App., 53a. (Emphasis added)

But where is the "essential nexus" between the legitimate state interest and the—admittedly unlawful—conditions exacted by the City? There is even *less* of "essential nexus" here than there was in *Nollan* when the court concluded that the correction did not meet even the loosest standard. *Nollan, supra.*.

The court tries in vain to construct a "connection," noting that in another case (unrelated to this one) the Supreme Court of Colorado had upheld R-1 zoning on adjacent real estate, and in so doing found that the objectives of the Cherry Hills zoning plan were "to protect a rural life style, preserve open space, and eliminate noise and traffic congestion." App., 53a, 54a.

From this statement the court concludes:

> Resolution 16 was reasonably calculated to further those objectives. Since there was a rational relationship between the resolution and the legitimate government interest behind the zoning [Note: which was *not* followed!] the Court concludes that there was a sufficient nexus between the two.
> App., 53a.

One hardly knows where to begin! Between which two? If the Court means between all zoning ordinances and Resolution 16, how does it deal with the fact that the zoning ordinance was not followed? The City acted without jurisdiction. . . it *cannot* rely on the zoning ordinance because the Colorado Supreme Court found that the zoning ordinance was not followed. If the Court means between the "general purpose" behind the zoning ordinance, how does it know that? Based on what evidence? *Dolan, supra*, (decided after the trial court's opinion, but ignored by the Colorado appellate courts) is very clear that merely having a generalized "legitimate public purpose" will *not* suffice. In *Dolan*, this Court recognized that prevention of flooding and reduction of traffic congestion may qualify as "legitimate public purposes," but that having a "legitimate public purpose" was only the beginning, not the end, of the inquiry.

As this Court noted in *Dolan*:

> Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland. The City's goals of reducing flooding hazards and traffic congestion, and providing for public greenways,

> are laudable, but there are outer limits to how this may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, *supra*, at 416.

Here, the purpose of rezoning ordinances may well be laudable—to protect a rural life style, preserve open space, and eliminate noise and traffic congestion—but the City acted outside the authority of the zoning ordinance. Moreover, it made no attempt, (nor does the court below point to *any* evidence) to show a reasonable relationship, or "rough proportionality" between the restrictions and the proposed project as required by *Dolan*. Merely saying it does not make it so. . . especially when the restrictions which kept the Petitioner from exercising the inherent right to develop its property for a period of eight years were passed by the City without jurisdiction and in abuse of its discretion.

Continuing to ignore the rationale of *Lucas* and *Nollan* (and the holding of *Dolan*), the Colorado courts concluded that there has been no taking in this case for three reasons: First, because Petitioner might have been able to develop one parcel of its property: "Even with the invalid prohibition against condominiums, the Developer could have built a resort hotel of up to 600 units" App., 54a. Moreover, the court gratuitously adds that Petitioner could have made other use of its land, such as for single family residencies on two and one-half acre lots, schools, non-profit golf courses, etc., so that even though the City unlawfully kept Petitioner from building condominiums and the hotel it desired, Petitioner was not damaged because it could have built a school or a non-profit golf course! App., 54a.

The court below noted that under a Colorado decision, *City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo.1993):

> Compensation is not due to a property owner merely if that person's property value is depreciated by government action.

But here, the "government action" was invalid—without jurisdiction and an abuse of discretion—and took away a valuable and legal right to develop its property for *no* legitimate governmental purpose. The trial court found that unless Petitioner is deprived of "all reasonable economic use. . ." there is no taking requiring compensation. App., 55a.

This Court has ruled otherwise:

> "As we have said on numerous occasions, the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests *or* denies an owner economically viable use of his land." *[Emphasis added] Lucas* , quoting *Agins v. Tiburon,* 447 US 455, 460 (1980); *See also Dolan, supra.*

Despite this attempt to find that there was no taking because the Petitioner was not deprived of "all reasonable economic use" of its property, the court below recognized that it could not rest on this bare assertion but, rather, had to find some "reasonable basis" for the City's actions. It did this by referencing the objectives of the zoning ordinances which the City failed to follow.

The reasoning of the trial court (as affirmed by the Colorado Appellate and Supreme Courts) on this point is

curious. It concluded that the purpose behind the City's zoning ordinance constitutes legitimate exercise of the police power of the City. He says that "a building decision which attempts to implement that purpose is a decision based on a rational basis." App., 55a.

Conceding that "the [Colorado] Supreme Court has found that the conditions on the approval were invalid" App., 56a, it then goes on to conclude that, invalid though they may be, "[t]his court finds that there was a rationale basis for the interpretation of the zoning code and a reasonable nexus between the interpretation and the legitimate purposes of the Code." App., 56a

However, other than stating it to be so, the court pointed to no evidence of such a "reasonable nexus." No "individualized determination" as required by *Dolan* was ever made or even attempted.

In fact, it is hard to understand how there possibly could be any "reasonable nexus" between the action of the City and the proposed development based on the purposes behind the zoning ordinance, since the zoning ordinance, as legally interpreted, would have permitted the condominiums to have been built and would not have required the payment of money to the City. It was the City, not Petitioner, that ignored the ordinance and imposed the restrictions without the authority to do so. How then, after ignoring its own ordinance, can it now be permitted to use the purposes behind that same ordinance to justify its illegal actions and escape financial responsibility for the losses it has caused?

Finally, the court below concluded that it could not find a "taking" because to do so would have a "chilling effect" on a

government's ability to make "everyday building decisions." App., 56a. But this use does not involve "everyday building decisions." This is a case in which the Supreme Court of Colorado found that the City imposed conditions "beyond its jurisdiction" and in "abuse of its discretion" which conditions "adversely affected Petitioner's property interest in realizing economic and beneficial use of its property." The real "chilling effect" of this case is on the property owner's right to receive just compensation for illegal government action which takes away legitimate property rights.

To give substance to The Fifth Amendment, the Court should grant certiorari to review this issue.

V. WHEN A CITY IS HELD BY ITS STATE'S HIGHEST COURT TO HAVE "ABUSED ITS DISCRETION" AND TO HAVE "EXCEEDED ITS JURISDICTION" BY IMPOSING ON A DEVELOPER'S LAND DEVELOPMENT PERMIT CONDITIONS NOT AUTHORIZED BY THE CITY'S ZONING ORDINANCE, THE CITY MAY NOT AVOID LIABILITY UNDER 42 U.S.C. § 1983 BECAUSE AT TRIAL, PETITIONER COULD NOT PROVE THE CITY ACTED "RECKLESSLY OR WITH GROSS NEGLIGENCE" IN IMPOSING SUCH UNLAWFUL CONDITIONS.

Petitioner in this case established a substantive due process claim under 42 U.S.C. §1983 by showing that a.) it had a federally protected right b.) it had been denied that right arbitrarily, capriciously or illegally c.) the denial of that right was by a person or persons acting under color of state law. *Littlefield v. City of Afton*, 785 F.2d 596, at 600 and 603-608 (8th Cir. 1986) (*"Littlefield"*).

Just as it did in with respect to Petitioner's right to receive just compensation for the unlawful taking of its property rights, the trial court began its analysis by making it appear clear that Petitioner has, indeed, been deprived of its right to the city's approval of its development plan without conditions in violation of 42 U.S.C . § 1983.

The trial court found that the Petitioner is a "person" entitled to bring a § 1983 claim, App., 60a; that the City is a "person" under § 1983 and that it was acting "under color of state laws" when it passed the invalid exactions, restrictions and conditions contained in Resolution 16 App., 59a; and that Petitioner possessed a Fourteenth Amendment right of substantive due process to have its development plan approved without the invalid exactions, restrictions and conditions. App., 62a.

However, the trial court then imposed an additional condition. It held that it is not enough that Petitioner was deprived of a federally protected right by the City acting under code of law (and in excess of its jurisdiction and in abuse of its discretion). In addition, under the decisions of the courts below, Petitioner, to recover under 42 U.S.C. § 1983, must prove "by a preponderance of the evidence that the [City] acted intentionally, recklessly, or with gross negligence." App., 64a.

This is not the proper 42 U.S.C. § 1983 standard. See *Owen v. City of Independence*, 445 U.S. 622 (1980): "A city may not assert the good faith of its officers or agents to avoid liability under 42 U.S.C. § 1983."

If a city cannot assert "good faith" as a defense, it must follow that a state court cannot impose upon a victim the burden of proving by a "preponderance of the evidence" that

the City's officers and agents were acting "intentionally, recklessly or with gross negligence"... essentially, requiring the victim to prove the absence of good faith by presuming its existence unless proved otherwise.

Most of the circuit courts considering the issue have held an arbitrary, capricious or illegal denial of a building or land use permit states a substantive due process claim under 42 U.S.C. § 1983. Id., at 604, and cases cited therein, including, *Rogin v. Bensalem Townships*, 616 F.2d 680, at 689-690, (3d Cir. 1980), *cert. denied*, 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed. 223 (1981); *Scott v. Greenville County*, 716 F.2d 1409, at 1418-21 (4th Cir. 1983); *Shelton v. City of College Station*, 754 F.2d 1251, at 1256-1257 (5th Cir. 1985); *Scudder v. Town of Greendale*, 704 F.2d 999, at 1002 (7th Cir. 1983); *Parks v. Watson*, 716 F.2d 646, at 656-657 (9th Cir. 1983).

The First Circuit, on the other hand, has a special rule for land use cases holding in such cases the doctrine of substantive due process, holding even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of constitutional deprivation. *PFZ Properties, Inc., v. Rodriguez*, 928 F. 2d 28 (1 Cir. 1991), *cert. granted in part* 502 U.S. 956, 112 S.Ct. 414, 115 L. Ed. 2d 435 (1991); *cert. dismissed as improvidently granted*, 503 U.S. 257, 112 S.Ct. 1151, 117 L. Ed. 2d. 400 (1992); *rehearing denied*, 504 U.S. 935, 112 S. Ct. 2001. 118 L. Ed. 2d 597 (1992).

This Court should therefore grant certiorari to resolve the conflict among the circuits it sought to resolve in the *PFZ* case.

CONCLUSION

What the Colorado State Courts have done in this case is precisely what Mr. Justice Scalia warned against in *Nollan, supra*; engaged in "an exercise in cleverness and imagination" to avoid the clear mandate of the Fifth Amendment and to avoid the direct holding of this Court in *Dolan* .

The Colorado State Courts recognized that Petitioner was subjected to unlawful actions, conditions and restrictions depriving it of its right to develop its property in accordance with the then applicable zoning regulations of the City of Cherry Hills Village. However, through a series of sometimes contradictory analyses, the courts were able to avoid the clear intent of both the Fifth Amendment and 42 U.S.C. § 1983. If protection of private property is to have any meaning, the decision of the Colorado courts in this case cannot stand. If the line of cases from *Lucas* to *Nollan* to *Dolan* are to have any meaning, the decisions of the Colorado courts in this case cannot stand.

Petitioner respectfully urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

JAMES B. RHOADS
Counsel of Record
JAMES K. KREUTZ
ROD J. PERA
JAMES B. RHOADS, P.C.
Attorneys for Petitioner
Suite 1780 Riverwood
3350 Cumberland Circle, N.W.
Atlanta, Georgia 30339
(404) 897-1800

INDEX TO APPENDIX

Page

Supreme Court, State of Colorado - Order - March 25, 1996 - *Cherry Hills Resort Development Company v. The City of Cherry Hills Village* 1a

Colorado Court of Appeals - Opinion - August 31,1995 - *Cherry Hills Development Company v. The City of Cherry Hills Village* 3a

District Court, Arapahoe County, Colorado - Order and Amended Judgment - August 23,1994 - *Cherry Hills Resort Development Company v. The City of Cherry Hills Village* 8a

District Court, Arapahoe County, Colorado - Findings, Conclusions, and Judgment - October 13, 1993 - *Cherry Hills Resort Development Company v. The City of Cherry Hills Village* 16a

District Court, Arapahoe County, Colorado - Answer - August 1, 1991 - *Cherry Hills Resort Development Company v. The City of Cherry Hills Village* 71a

District Court, Arapahoe County, Colorado - First Amended Complaint - Filed January, 1991- *Cherry Hills Resort Development Company v. The City of Cherry Hills Village* 81a

Colorado Court of Appeals - Mandate - May 23, 1990 - *Cherry Hills Resort Development Company v. The City of Cherry Hills Village* 100a

Page

Supreme Court, State of Colorado - Mandate - May 29, 1996 - *Cherry Hills Resort Development Company, et al., v. The City of Cherry Hills Village, et al.* ... 102a

Supreme Court, State of Colorado - Opinion - April 30, 1990 - *Cherry Hills Resort Development Company, et al., v. The City of Cherry Hills Village, et al., 790 P.2d 827 (1990)* 104a

Colorado Court of Appeals - Opinion - August 25, 1988 - *Cherry Hills Resort Development Company, et al. v. The City of Cherry Hills Village, et al.* 121a

Supreme Court, State of Colorado - Opinion - June 6, 1988 - *Cherry Hills Resort Development Company, et al. v. The City of Cherry Hills Village, et al., 757 P.2d 622 (1988)* 127a

Colorado Court of Appeals - Opinion - February 25, 1986 - *Cherry Hills Development Company, et al. v. The City of Cherry Hills Village, et al., 720 P.2d 992 (1986)* 143a

District Court, Arapahoe County, Colorado - Opinion and Ruling - March 12, 1984 - *Cherry Hills Resort Development Company, et al. v. The City of Cherry Hills Village, et al.* 148a

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC695
CERTIORARI TO THE COLORADO COURT OF APPEALS,
93CA2015
DISTRICT COURT, ARAPAHOE COUNTY, 82CV603

ORDER OF COURT

CHERRY HILLS RESORT DEVELOPMENT COMPANY,
a Colorado limited partnership,

Petitioner,

v.

THE CITY OF CHERRY HILLS VILLAGE,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 25, 1996.

cc: James K. Kreutz
JAMES K. KRUETZ & ASSOCIATES, P.C.
5655 South Yosemite, #200
Englewood, Co 80111

Robert L. Morris
MORRIS & ASSOCIATES
6059 S. Quebec Street, #203
Englewood, Co 80111

Honorable Kenneth K. Stuart
Arapahoe County District Court
Arapahoe County Justice Center
7325 South Potomac Street
Englewood, CO 80112

Clerk of the District Court
Arapahoe County District Court
Arapahoe County Justice Center
7325 South Potomac Street
Englewood, CO 80112

Patrick H. Stanford, Clerk
Colorado Court of Appeals

SUPREME COURT
STATE OF COLORADO

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

MAR 25 1996

Court Seal

MAC V. DANFORD
Clerk of the Supreme Court
By /s/

COLORADO COURT OF APPEALS AUGUST 31, 1995
No. 93CA2015 NOT SELECTED FOR PUBLICATION

CHERRY HILLS RESORT DEVELOPMENT COMPANY,
a Colorado limited partnership,

Plaintiff-Appellant and Cross-Appellee,

v.

THE CITY OF CHERRY HILLS VILLAGE,

Defendant-Appellee and Cross-Appellant.

Appeal from the District Court of Arapahoe county
Honorable Kenneth K. Stuart, Judge
No. A82-CV-603

Division IV JUDGMENT AFFIRMED
Opinion by JUDGE MARQUEZ
Sternberg, C.J., and Davidson, J., concur

James K. Kreutz & Associates, P.C., James K. Kreutz, Englewood, Colorado; Swift, Currie, McGhee & Hiers,James B. Rhoads, R. Thomas Hicks, William C. Collins, Jr., Atlanta, Georgia, for Plaintiff-Appellant and Cross-Appellee

Morris & Associates, P.C., Robert L. Morris, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

Plaintiff, Cherry Hills Resort Development Company, a Colorado limited partnership, appeals from a district court judgment denying its damage claims against defendant, the City of Cherry Hills Village (City). The City cross-appeals, claiming the district court erred in its rulings concerning the actionability of plaintiff's claim for damages from deprivation of substantive due process. We affirm.

The parties to this action have been involved in many years of litigation, giving rise to two supreme court opinions, Cherry Hills Resort Development Co. v. City of Cherry Hills Village, 757 P.2d 622 (Colo. 1988) (Cherry Hills I) and Cherry Hills Resort Development Co. v. City of Cherry Hills Village, 790 P2d 827 (Colo. 1990) (Cherry Hills II). The underlying facts and history of this case are set out in detail in Cherry Hills II, and concern an attempted development of a residential and resort hotel which was never constructed.

Shortly after the supreme courts's decision in Cherry Hills II, concluding that the city council exceeded its jurisdiction and abused its discretion in imposing several of the restrictive conditions, plaintiff's lease, under which it claims its rights to develop the property, expired. Consequently, plaintiff never developed the resort hotel and condominium project.

The Temple H. Buell Trust, the owner of the property at all relevant times, and its Trustees, who had been co-plaintiffs in the case, asked to be dismissed following Cherry Hill II. They

were dismissed as parties approximately one year before trial.

On remand from the supreme court, pursuant to Cherry Hills II, plaintiff sought damages under three different theories: wrongful taking in violation of the United States and Colorado constitutions, damage to property under the state constitution, and wrongful denial of its development permit in violation of its constitutional right to substantive due process under 42 U.S.C. §1983 (1988).

After a bench trial, the court, in an exhaustive, detailed, and well-reasoned order, determined that, in spite of the invalid restrictive conditions the City imposed on plaintiff's development plan, plaintiff was not entitled to damages under any of the theories it asserted. The court, however, awarded plaintiff a portion of its costs for prevailing on its claim that the restrictive conditions were invalid.

I.

Plaintiff contends the trial court erred in ruling against each one of its damage claims. We disagree.

A plaintiff may not recover damages for losses beyond an amount the plaintiff can establish with reasonable certainty by a preponderance of evidence. Pomeranz v. McDonald's Corp., 843 P.2d 1378 (Colo. 1993).

Further, before damages for lost profits may be awarded, one who seeks them must establish that the damages are traceable to and are the direct result of the wrong to be redressed. Graphics Directions, Inc. v. Bush, 862 P.2d 1020 (Colo. App. 1993).

On appeal, plaintiff advances the arguments it

presented before the trial court in an attempt to have the City's actions declared to constitute a taking, to result in damage to the property, and to violate plaintiff's right to substantive due process. We do not reach these issues because plaintiff's failure to establish that its damages are traceable to, and are the direct result of, the City's invalid conditions precludes its recovery of any but nominal damages under all of its various claims.

The trial court, upon thorough consideration and with record support, determined that plaintiff did not establish by a preponderance of the evidence that it would ever have been able to obtain financing for the project or that it would have realized any profit from the project. Although the court considered the measure of damages for each of plaintiff's claims, it ultimately determined that there was no foundation of concluding the plaintiff suffered any damages. The court further concluded that the restrictive conditions did not cause any loss to Plaintiff. Neither the restrictions nor the pending lawsuit caused the project to remain unfinanced and undeveloped.

We conclude that the record supports the trial court's findings that plaintiff failed to establish by a preponderance of the evidence that its damages were traceable to and the direct result of the invalid conditions. Thus, the trial court correctly entered judgment for the City on all remaining claims.

II.

The City cross-appeals from (1) the implicit ruling of the trial court that plaintiff properly pleaded or thereafter

timely asserted a claim for damages from deprivation of substantive due process under 42 U.S.C. §1983, and (2) the court's ruling that the action of the City gave rise to a constitutional claim of deprivation of substantive due process. However, because of our disposition of plaintiff's appeal, we need not address the issues raised on cross-appeal.

The judgment is affirmed.

CHIEF JUDGE STERNBERG and JUDGE DAVIDSON concur.

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO
Case No. A82CV603

ORDER AND AMENDED JUDGMENT

CHERRY HILLS RESORT DEVELOPMENT COMPANY,
a Colorado limited partnership,

Plaintiff,

v.

THE CITY OF CHERRY HILLS VILLAGE,

Defendant.

The Court entered judgment for the Plaintiff for costs and the Plaintiff has submitted a bill of costs to which the Defendant has objected. After a review of the file and the matters submitted, the Court approves costs in the amount of $2,754.98 and amends the judgment to include those costs.

I. Entitlement to Costs.

In the judgment entered on October 13, 1993, this Court noted that the claim pursuant to C.R.C.P. 106(a)(4) was predominating in the litigation and that the Plaintiff prevailed on that claim. Pursuant to Section 13-16-111, C.R.S., the Plaintiff is entitled to an award of costs.

That statute provides that

> A plaintiff who obtains judgment... in an action brought under subsection (4)... of rule 106(a), C.R.C.P. shall recover his costs of suit.

Costs which may be awarded as "costs of suit" are set out in Section 13-16-122, C.R.S. That list of costs in 13-16-122 is not exclusive, but is illustrative of the costs which may be awarded. Cherry Creek School District v. Voelker, 859 P.2d 805, 813 (Colo. 1993). An illustrative list means that the Court can award as costs items which are not specifically included in the list. In Voelker the Supreme Court approved costs which were "reasonably necessary for the development of the case" (Id., referring specifically to costs for discovery deposition). The court will apply that same standard of reasonable necessity to the costs claimed in this case.

Similarly, the restrictions on attorney fees in Section 13-16-122(1)(h), C.R.S., are not exclusive. That section (13-16-122(1)(h)) provides for recovery of attorney fees "when authorized by statute or court rule." In Ferrell v. Glenwood Brokers, Ltd., 848 P.2d 936, 942 (Colo. 1993), the Supreme Court decided that contractually authorized attorney fees could be awarded as costs rather than damages because there was "no specific prohibition against" such an award of costs.

The Court in Ferrell, 848 P.2d at P. 941, concluded that a trial court should exercise its discretion in determining

whether attorney fees are costs of damages and that that discretion should be guided by the nature of the requested attorney fees. If those fees are the consequence of the act sued on, then they are damages; if they are the consequence of an agreement to shift fees to a prevailing part, they are costs.

In the present case before the Court, the attorney fees were incurred as part of the effort to reverse a governmental decision: they were incurred as the price for prosecuting a Rule 106(a)(4) appeal. There was no contract between the parties which authorized the shifting of attorney fees. There is no statute of court rule which expressly authorizes the awarding of attorney fees for this kind of litigation.

There are two possible authorities for awarding attorney fees in this case. The first is that they are authorized by statute of court rule (and therefore awarded as costs under 13-16-122(1)(h)). As stated above, no statute of rule expressly authorizes an award of attorney fees for a Rule 106(a)(4) claim.

The only other statutory authorization which might be applied to this case is an award based on frivolous or groundless litigation under Section 13-17-102, C.R.S. The Defendant did not succeed in its opposition to the Rule 106(a)(4) claim. However,

the lack of success with a claim or defense does not by itself, mean that the claim was frivolous or groundless. Torres v. Portillos, 638 P.2d 274, 276 (Colo. 1981); Cohen v. Empire Cas. Co., 771 P.2d 29, 31 (Colo. App. 1989).

The Defendant did succeed in convincing the Court of Appeals that the Rule 106(a)(4) claim should be denied. It succeeded once on the assertion that the trial court lacked jurisdiction, Cherry Hills Resort Dev. Co. v. Cherry Hills Village, 720 P.2d 992 (Colo. App. 1986), and succeeded a second time on the merits of the development restriction, Cherry Hills resort Dev. Co. v. Cherry Hills Village, NSFP, (83CA428, Aug. 25, 1988). Although both of these Court of Appeals decisions were reversed by the Supreme Court, see Judgment in this case, October 13, 1993, pp. 4-5, the Court concludes that the success with the Court of Appeals demonstrates that the City's opposition was not frivolous or groundless.

The second possible authority for an award of attorney fees is the discretion of the Court authorized by Ferrell, supra, and discussed above. The Ferrell court stated that

> In general, absent a specific prohibition, the trial court has discretion over the awarding of costs.

848 P.2d at p. 940. This statement followed a summary of the "American rule" under which the parties to a case pay their own

attorney fees unless there is some exception to the general rule.

In the exercise of that discretion authorized by Ferrell, this Court determines that the Plaintiff is not entitled to an award of attorney fees. The fees incurred here were for the prosecution of an appeal from the City's action through many

levels of court activity. There is nothing which makes this case generically and different from any other Rule 106(a)(4) appeal: there was no zoning code provision or municipal ordinance relating to attorney fees, and none of the prior trial court or appellate court decisions have awarded attorney fees. An award of attorney fees in this case would indicate that attorney fees are always to be awarded for the prevailing party in a Rule 106(a)(4) appeal. The Court in Ferrell, 848 P.2d at p.940, suggested that the language in Section 13-16-122(1)(h) (which states that attorney fees are awarded as costs when authorized by statute or rule) is not to be taken as an abolition of the American rule. The legislature has not abolished the American rule either expressly or by implication and has not expressly authorized an award of attorney fees in this case are not "costs" to be awarded under 13-16-122.

II. Costs awarded.

A. Court fees. The Plaintiff has requested $526.00 for the costs of filing this case and four separate appeals. Those costs.

are authorized under § 13-16-122 (1)(a) and the Court approves those costs.

B. Photocopies. The Plaintiff has requested $2,064.22 for necessary photocopies. The Defendant has accurately pointed out that there is no breakdown of the nature of the documents copies and the reasons for the copying. Nonetheless the Court approves the request.

Costs for copies "necessarily obtained for use in the case" are authorized. § 13-16-122(1)(f). The Rule 106

portion of this case required copies of many supporting project documents as well as copies of all city records relating to the issues. All matters filed with the appellate courts required either ten or five copies. See C.A.R. 31(b) and 27(d). Even without the breakdown of those costs, it appears to the Court that thousands of pages of copies were reasonably necessary.

C. Miscellaneous Expenses. The Plaintiff has requested $1,875.75 miscellaneous costs and has broken those down by category. The Court approves $164.76 from that list.

The Court finds the following costs to be reasonable necessary for the development of the case and/or to be authorized under Section 13-16-122, C.R.S.:

-6-

Telecopies:	$16.21
Village Newspaper:	$20.00;
Mileage, parking, photocopies:	$23.80;
Secretary of State:	$80.00;
Arapahoe Clerk & Recorder:	$24.75.

Those items total $164.76.

The Court does not approve the remaining items. Those are not authorized under 13-16-122 and there has been no showing that telephone charges, courier costs, Federal Express costs, secretarial overtime or Lexis charges were reasonably necessary.

III. JUDGMENT.

The judgment entered October 13, 1993, for the Plaintiff, Cherry Hills Resort Development Company, and against the Defendant, City of Cherry Hills Village, is amended to include costs of $2,754.98.

DONE this 23rd day of August, 1994.

BY THE COURT:

/s/ Kenneth K. Stuart
JUDGE KENNETH K. STUART

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing order and Amended Judgment was placed in the U.S. mail, postage prepaid this 25 day of August, 1994 to the following:

Robert L. Morris, Esq.
Suite 630
7800 East Union Ave.
Denver Technological Center
Denver, Co. 80237

James Kreutz, Esq.
Suite 200
5655 South Yosemite
Englewood, Co. 80111

/s/ N J A

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO
Case No. A82CV603, Division 4

FINDINGS, CONCLUSIONS, AND JUDGMENT

CHERRY HILLS RESORT DEVELOPMENT COMPANY,
a Colorado limited partnership,

Plaintiff,

v.

THE CITY OF CHERRY HILLS VILLAGE

Defendant.

This matter came on for trial to the Court over eight days in a four month period. After a review of all the testimony and the exhibits the Court enters judgment for the Defendant on all remaining claims and for the Plaintiff for costs.

This case had its genesis thirty-six years ago when Temple Buell had a dream to build a resort hotel in Cherry Hills Village. Twenty-two years later the Plaintiff envisioned and developed plans for the Colorado Biltmore, a development that would realize Mr. Buell's dream on a grand scale.

Then began a tortured legal path. After four appeals the parties finally had a chance to try the case on its merits and that has been a detailed and time-consuming process. Fortunately for the Court and the parties, counsel on both sides presented both the factual and legal issues of the case in an exemplary fashion.

The logical tendency in the case at this point is to conclude that since the City imposed invalid restrictive conditions on the Plaintiff's development plan, the Plaintiff must be entitled to damages. However, the Court concludes that the law and the facts of this case do not support that progression.

I. FINDINGS.

A. Procedural and Legal History.

1. Subject matter.

The case concerns approximately 116 acres of land located at the southeast corner of the intersection of South University Boulevard and East Hampden Avenue, all within the city limits of Cherry Hills Village (Referred to as the property). The Plaintiff sought to develop the land, the City placed some restrictions on that development and this lawsuit was filed to invalidate those restrictions and obtain damages.

2. Parties.

The Plaintiff, Cherry Hills Resort Development Company (CHRDC), is a Colorado limited partnership.

Throughout the evidence, other entities were mentioned that have an affiliation with this Plaintiff: Tucker Boulineau Development Corp. and Fred Boulineau Associates, Inc. were predecessors to the Plaintiff; Fortune Investments of Colorado, Inc. is a general partner of the Plaintiff; Fred M. Boulineau and Stephen L. Tucker are individuals who are limited partners of the Plaintiff. (The Court will often refer to the Plaintiff as the developer. Communications from or to the Plaintiff are communications by or to either Fred Boulineau or Stephen Tucker.)

The Defendant, City of Cherry Hills Village (the City), is a home rule city located entirely within Arapahoe County, Colorado.

Other parties have been present in this case over the years but are no longer parties to the case at this time. The Temple H. Buell Trust and its Trustees, Temple Buell and Richard Nathan, were originally co-plaintiffs in the case. They asked to be dismissed after the last appellate decision in this case and were dismissed as parties approximately one year before trial.

Various individual past and present members of the City Council of the Defendant City and the City Council itself were

named as defendants. All claims against those parties were dismissed by stipulation of the parties at the beginning of trial and those parties have been dismissed from the case.

3. Legal history.

In 1984, the Trial Court ruled on the Plaintiff's request for CRCP 106(a)(4) review of the actions of the City. The Trial Court did not enter a final judgment on the claims for damages. The Trial Court upheld some of the restrictions imposed by the City and invalidated others.

The case then proceeded through the appellate courts. All decisions bore the case name of Cherry Hills Resort Dev. Co. v. Cherry Hills Village. The Colorado Court of Appeals held that the Trial Court lacked jurisdiction and directed that the complaint be dismissed. 720 P.2d 992 (Colo. App. 1986). The Colorado Supreme Court reversed, holding that the Trial Court did have jurisdiction and remanded the case to consider the original appellate issues. 757 P.2d 622 (Colo. 1988) (Referred to as CHRDC I).

On remand, the Court of Appeals found that the City had acted properly in prohibiting condominiums in the development. (No. 83CA428, Aug. 25, 1988, not selected for publication.) The case returned to the Supreme Court and the Court reversed the Court of Appeals, invalidated some of the development restrictions, upheld

others, and remanded the case for trial on the other issues. 790 P.2d 827 (Colo. 1990), (CHRDC II).

This Court is bound by the legal determinations of the Supreme Court on the issue of whether the City acted within its jurisdiction and by the findings of fact which relate to that issue.

4. History of controversy.

The property was owned at all relevant times by the Trust.

The succinct factual history set out by the Supreme Court in CHRDC II, 790 P.2d at 828, will be incorporated verbatim.

> This dispute involves the development of a 68.8 acre parcel of property in the City of Cherry Hills Village (City). In 1957 Temple Buell owned approximately 116 acres of land at the corner of Hampden Avenue and University Boulevard. This land was zoned R-1, a residential district with a minimum lot area of 2 1/2 acres for single family dwellings. Buell proposed to the City the construction of a "residential and resort hotel" complex which would include the development of a luxury hotel, residences, a lake, golf course, shops and other amenities. As a result, 68.8 acres of Buell's land was rezoned to RA-1, which permitted the land to be used for a "residential and resort hotel" and any other use permitted in an R-1 residential district.
>
> The proposed complex was never constructed. In 1980, the Cherry Hills Resort Development Company (Developer) entered into an agreement with the Temple H. Buell Trust (Trust) to lease and develop the property. In

July 1982, the Developer submitted two alternative development plans to the Cherry Hills Village City Council (city council). The plans were identical except that the first plan required the City to permit a golf course on a portion of the property zoned R-1. The second plan placed the golf course in a portion of land which was already zoned RA-1, thus requiring no further zoning action. Both plans proposed a 600 room hotel and a 200 room structure or structures committed either to condominiums or apartments.

In September 1982, the city council passed a resolution approving the second development plan, but made its approval subject to twenty restrictions and conditions. Two of these conditions completely eliminated the proposed construction of luxury condominiums or apartments. The remaining conditions placed significant limitations on the development of the proposed hotel and surrounding grounds.

As additional background, the Court finds that Plaintiff's predecessor and the Trust had entered into a preliminary development agreement in July 1979. In October 1980, those parties executed an Agreement to Lease (Exhibit 3).

That Agreement to Lease permitted the Plaintiff's predecessors to develop a resort hotel and condominium complex on the property. The property was then to be leased to future tenants by virtue of a Resort Hotel Ground Lease and a Condominium Ground Lease. Contingencies in the Agreement included that the Trust had to approve the future tenants, the hotel management company, and the financial condition of the guarantors, and that the developer had to obtain binding commitments for construction loans, a contract with a reputable management company, and personal guarantees of the

leases.

The first of the original plans submitted to the City showed an 18-hole golf course on the property. That plan would have necessitated re-zoning of the R-1 portion of the property. The second plan did not require re-zoning because the golf course was entirely on the RA-1 portion of the property. On that second plan, the golf course was a 9-hole "executive" length golf course. (An "executive" length course is longer than a "par 3" course and shorter than a regulation course.)

When the City approved the second plan, it did so by passing Resolution 16 of the Series of 1982 on September 21, 1982. The conditions attached to that approval are particularized to some extent in Section II, B, below and in CHRDC II, 790 P.2d at 829, 831-832.

On September 17, 1982, shortly before the City approved the plan in Resolution 16, the Plaintiff and the

Trust amended their October 16, 1980, Agreement to Lease. That amendment extended the performance date for the Plaintiff to either 9 months after appellate or other final court proceedings required approval of the plan, or 90 days after the City disapproved the plan if the Plaintiff did not seek judicial review. (Exhibit 88).

-7-

The Court finds, contrary to the position of the Plaintiff, that this amendment did not require or compel the Plaintiff to prosecute this lawsuit.

Resolution 16 approved the project subject to conditions and the Plaintiff was legally able, from September 1982 on, to develop the project consistent with those conditions.

Although the Plaintiff chose not to develop the project as approved by the City, the Plaintiff did continue to pursue completion of the contingencies and the necessary developmental background work necessary for the project.

Both before the City's conditional approval and during this litigation, the Plaintiff expended time and money on predevelopment activities such as architectural drawings, acquisition of water rights, development of financial plans and feasibility studies, acquisition of financing, acquisition of a hotel operator agreement, construction analysis, acquisition of golfing rights on near-by courses, and other planning efforts. The nature of some of these efforts and their level of success are detailed below.

B. Developmental history.

Major issues underlying the evidence presented in this case are whether the restrictive conditions placed on the City's

approval prevented the Plaintiff from proceeding with the development and whether the Plaintiffs have suffered any actual damages as a result of the City's action. Facts relating to those major issues will be grouped by subject matter, rather than chronology.

1. Project modification

After City approval of the hotel (and disapproval of the condominiums) in Resolution 16 in September 1992, the Trust joined the developer as a plaintiff in this lawsuit filed in October 1982.

After that, on December 13, 1982, in a letter, the Trust authorized the Plaintiff to proceed with the hotel portion of the project. (Exhibit D-153). That letter recognized that the project approved by the City was less than the project contemplated in the Agreement to Lease between the Trust and the Plaintiff. The letter stated that the trust would

> accept such modification of the Agreement...as is necessary to permit you to perform the Agreement to such extent as has been permitted by City Council's September 21, 1982, resolution.

The Plaintiff was aware of this letter and understood

that it permitted modification of the Agreement to Lease. The Plaintiff mailed copies of this letter to different companies in 1984 and 1985, and even referred to this letter as the "modification" of

their lease. (Exhibits P-27, D-285 and P-41.)

The Plaintiff had provided assurances to the Trust that the conditional approval given by the City for just the hotel made the project workable and financeable. A letter from the Trust (Ex. P-134) on November 30, 1983, to the Plaintiff referred to those assurances and asked the Plaintiff to advise the Trust if the Plaintiff had changed its position on the workability or economics of the project. The Plaintiff did not respond to that letter and apparently did not attach any importance to it at the time. (That lack of importance reinforces the finding that the Plaintiff had assured the Trust that the project could be built and operated as approved by the City.)

The Plaintiff was aware that Resolution 16 had approved construction of the hotel and the Plaintiff sought investors and operators for the hotel based on that approval. (The Plaintiff's testimony at trial that it did not have development rights, or thought it did not have development rights because of the City's action was not supported by the other evidence and detracted from the credibility of the Plaintiff's principal witnesses.)

2. The lawsuit.

The parties have argued over whether the pendency of this lawsuit prevented development of the project. There

was opinion

testimony that the lawsuit interfered with obtaining financing (from Sidney Montague, Trustee of the Trust, and Daniel McGoldrick, an expert witness called by Plaintiff). There was testimony that the lawsuit had an effect, but that it was relatively unimportant (from William Perrett, an expert witness called by Defendant).

It is notable that there was no documentary evidence which identified the lawsuit as an obstacle to financing. In a letter to Temple Buell from Fred Boulineau (the Plaintiff) on October 28, 1983 (Ex. D-226), the Plaintiff provided a progress report on efforts to obtain financing from thirty-four different sources. As to some of those sources, the Plaintiff indicated reasons the source was not interested in being involved with project financing. The pending lawsuit was not included as a problem for any potential financing source. The problems that were listed included such concerns as timing, too negative, only interested in existing projects, too many hotels in portfolio, other investment closings, and the unsubordinated land lease.

The Court finds this to be significant in light of the Plaintiff's ability to pursue the project without the condominiums (discussed above). The Plaintiff had assured the Trust that the project as approved was financeable. This indicates that financing for the hotel and golf course portion of the project had been considered and was believed to be possible. If that financing had been obtained, it would have been for the portion of the project

not involved in the lawsuit and would have been independent of whether the lawsuit was pending or dismissed.

In addition, the testimony of Mr. McGoldrick was that he had tried to locate financing for the project and that he had limited his efforts because of the lawsuit, i.e., he had stopped short of trying to get a commitment. The lawsuit appears to have been a self-imposed limitation of the Plaintiff's financing efforts.

The court concludes as a finding of fact, that the pendency of the lawsuit was not a substantial factor in preventing construction of the project or in preventing the Plaintiff from obtaining financing. The evidence is so strong, it convinces the Court beyond a reasonable doubt that if the Plaintiff had found financing, the Plaintiff would have immediately applied for a building permit to construct the project as approved.

3. Financing

Although the evidence identified many possible reasons for the failure to complete the project, it is very clear from the evidence that the principal problem was a lack of financing. Most of the other problems related to financing. The estimated costs for the project were over eighty-nine million dollars.

These factors are causally interrelated and overlap a great deal. For example, the nature of the unsubordinated ground lease related almost exclusively to financing; the lack of a championship 18 hole golf course related to

financing, to obtaining a hotel operator, and also to the ultimate success of the project; the lack of a hotel operator related to financing, to the Trust's contractual right to approve or reject a prospective operator, and to the ultimate success of the project. Finally, some of the factors had a chicken/egg timing relationship, e.g., lenders wanted a hotel operator up-front, and at least one hotel operator thought the project was not financeable and was not interested without financing in place.

The developer was looking for both equity financing and debt financing. Equity financing is money provided to the project in return for an ownership interest in the project and a share of future profits. Debt financing is money provided to the project in return for repayment of the debt plus interest. The debt financing needs included both construction financing and long-term financing.

Factors identified in the evidence as relating to finding financing are the following:

a. Lack of development rights. As discussed above, this was not a genuine issue. The Plaintiff could have developed the property after Resolution 16.

b. Pending lawsuit. As discussed above, this had an effect, but not a substantial one.

c. Quality and lack of loan information materials. Many of the financing sources the Plaintiff contacted expressed interest but were never provided with any follow-up information on the project (per Mr. McGoldrick). When lenders received the financial feasibility study in 1984, the

information was, at best, fifteen months old and therefore stale in terms of the hotel financing market. By the late 1980's, this information was so stale that it was impractical to present it to a lender.

The informational brochure which was provided to some lenders contained errors that would not have been helpful to efforts to obtain financing.

Many lenders would have wanted to review the owners' (Plaintiff's partners) financial statements before making a decision. These were not made available. The Plaintiff's expert (McGoldrick) could not testify as to whether those statements would have helped or hurt the financing efforts.

d. Response of the market. Some prospective finance sources were interested and then did not want to go farther with the project and the Plaintiff did not know why. (This tends to support the Defendant's position that the project could not be financed.)

-14-

The project was "shopped" in the financial marketplace. The Defendant's expert (Perrett) testified that the Plaintiff went to 69 sources for funds and did not obtain a lasting commitment. Lenders are less willing to lend for a project that has been "shopped" around.

e. Conditions imposed by the City. One Trustee of the Trust (Montague) and the principal limited partner of the Plaintiff (Boulineau) testified that the conditions were an obstacle to financing. However, none of the correspondence, memos, or documents concerning financing identified the conditions as an obstacle to financing.

Mr. Boulineau also testified that the lack of condominiums affected the financing. He believed that the condominiums would have been a draw for the hotel and a "carrot" for the equity investor. Without the condominiums, the project was not unique; with them it was unique and therefore more attractive.

f. Financing plan. The Plaintiff was trying to find an equity finance partner who would put up 25% of the cost of the project, would guarantee the funding of the project, and who would receive 50% of the ownership and 75% of the initial cash flow. (The pro formas may have been based on a 50% share of the cash flow.) This placed all the down-side risk on the equity partner and none on the Plaintiff. This was a structure very favorable to

the Plaintiff and very onerous to the chances of finding financing.

Registry Hotels believed that this financing arrangement was not possible (Ex. D-165) Paige International Investments recommended a re-structure of the financing plan and advised the Plaintiff that it would not be economically viable as they had planned it. (D-255) AmCal was also concerned over this financing structure.

In summary, the Plaintiff wanted financial terms which many investors would not accept.

Another problem was that Mr. Buell, or the Trust, was to receive 25% of all net income after preferential payments were made. This arrangement could have caused

problems with investors, especially if they were unaware of the payment arrangement.

g. Golf course. The concept of a resort hotel as a destination resort included an 18-hole championship golf course. Although the evidence did not precisely define what was meant by "championship," the Court finds that it meant a full-length course with a par of 70 or greater.

Mr. Boulineau's testimony about the need for and his testimony about his position concerning a golf course was very inconsistent. The Court accepts his written opinion that an 18-hole golf course

was essential to the project (as written in a letter to Mr. Buell in June 1983, Exhibit 23 (also D-198)).

Even though the Plaintiff had, in 1979 and 1980, investigated the possibilities of re-zoning the land for a golf course and the possibilities of buying 50 acres of land adjoining the property for golf purposes, and even though the Plaintiff believed that an 18-hole course was "essential," the Plaintiff requested only a 9-hole executive length course in the plan which the City approved in Resolution 16.

This created financing problems. In May 1984 Steve Tucker (a partner of Plaintiff) reported to Fred Boulineau (a partner of Plaintiff) that the lack of an 18-hole golf course was a major problem for financing (Ex. D-261). In November 1985, Boulineau wrote to Tucker that the course was the most critical element of the project (Ex. D-325).

The Plaintiff regarded the golf course as so important

that it misrepresented the project to at least one potential investor (William Johnson) in a July 1983 letter, in which the Plaintiff referred to an 18-hole course even though the plan submitted by the Plaintiff only included 9-holes (Ex. D-202). The same occurred in September 1984 (Ex. D-287, p. 2) with Williams Realty.

-17-

The Plaintiff had made arrangements to purchase approximately 40 memberships at Lone Tree Country Club, a private golf course about ten miles away.

In correspondence and documents, many lenders indicated that a full golf course was a necessary condition for their financing. Among those were First Interstate Bank (Ex. D-215(A)), California Federal (D-265), AmCal, Westin Hotels and Williams Realty, and American Continental Corporation. In addition, hotel operators deemed the 18-hole course to be essential: Princess Hotels, Marriott, and Registry Hotels. (Exs. D-165, D-265. D-287, D-291, D-295, D-299, D-319)

h. Hotel operator. Mr. McGoldrick testified (and the Defendant's expert, Mr. Perrett, agreed) that most lenders typically want the hotel operator identified before they agree to financing (although some might commit subject to finding an acceptable operator). The Plaintiff never obtained a contract with a hotel operator.

The Plaintiff avidly pursued Marriott Hotels as the operator. Ultimately, Marriott would not agree and thought that the project was not financially feasible. (See inter alia, Ex. D-63, D-213, D-331).

-18-

The Plaintiff also contacted Westin Hotels (Ex. D-252), Registry Hotels (D-177), Crescent Hotels, Hyatt Hotels (D-59, D-67), Ritz-Carlton (D-202), Canadian Pacific (D-264), Hilton International (D-304), and Princess Hotels (D-324). In all, the Plaintiff contacted 22 different hotel management companies.

(This high number of contacts with no success is also important in relation to the uncertainty of the project. The Trust retained the authority to approve the hotel operator and had identified only a few that it would approve. In fact, the Trust did not approve of Registry Hotels, one operator the Plaintiff was working on.)

i. Unsubordinated ground lease. The October 1980 Agreement to Lease between the Plaintiff and the Trust provided that the ground lease would be unsubordinated. This meant that a lender would be in second place to the Trust in case of a default and might be unsecured. This greatly narrowed the field of possible lenders.

A short-term unsubordinated lease would have completely prevented financing. However, the lease contemplated here was a long-term (99 year) lease and therefore financing was possible. (Financing had been located for another Buell owned land project at the Cherry Creek Shopping Center under an unsubordinated lease.)

-19-

Mr. McGoldrick and Mr. Perrett both testified that only about ten percent of lenders will loan on a hotel project. Mr. Perrett testified that of that number, only some will loan

as much as the seventy-one million dollars the Plaintiff wanted, and only a small percentage of those would loan on an unsubordinated ground lease. Mr. McGoldrick agreed that the total would be only three to four percent of the lender market. Mr. Boulineau agreed with that estimate.

In April 1980, Mr.. Boulineau had considered that the form of lease rendered the project unfinanceable (Ex. D-40).

Various potential lenders expressed specific concern with the form of the lease: New York State Employees Retirement System (D-226), Merrill Lynch, (D-226), Paige International Investments (D-255), AmCal (D-266), and Westin Hotels and Williams Realty (D-287).

j. The project itself. Lender concerns were expressed about the location of the project, the distance from the interstate highway and the airport, the need to maintain a high level of business travellers at a resort hotel, the very high construction costs per room (estimated at $149,000 in 1984 and other estimates had been as high as $189,000 per room), the very high room rates necessary to cover those kinds of construction costs, and the size of the hotel.

l. Other concerns. Additional factors bearing on the availability of financing included the high cost of obtaining financing (e.g., Paige would cost nine million dollars), the many contingencies in the Agreement to Lease (Ex. 3), and the worsening market for hotel financing as the 1980's progressed (which meant that lenders would fund only the low risk projects).

In summary, the Court finds that the Plaintiff has not

shown by a preponderance of the evidence that it would ever have been able to obtain financing. One major reason financing was never obtained was the incomplete nature of the Plaintiff's efforts to obtain financing. The evidence convinces the Court that the Plaintiff's chances of obtaining financing, if it had pushed harder for a commitment, were probably about ten percent.

4. Ultimate success of the project.

The Plaintiff has claimed for damages for lost profits. The Plaintiff's ability to make any profit on the project can be determined by evaluating the factors identified in the evidence that bear on whether the project could have succeeded.

This is difficult to do because almost all the evidence focused on the project with condominiums included; the project which the City approved and the Plaintiff believed was "workable and financeable" did not include condominiums. Any damages flowing

from the profits of a project with condominiums would have to be compared to the profits from a project without condominiums which the Plaintiff could have built and chose not to. If the Plaintiff was correct that both projects were workable, the Plaintiff suffered damages only if the profits from the project which the City prevented would have been higher than the profits from the project which the City permitted.

Evidence or relevant factors can be summarized as follows.

a. Nature of the project. The Plaintiff intended a first class, five star resort hotel. It could have been a unique property with the full maid service condominiums and would have been unique to the Denver area.

The architectural drawings and visualizations of the so-called "Colorado Biltmore" project depict a beautiful and luxurious resort. The Court commends the Plaintiff's principals for their vision.

b. Location of the project. The project located in the metropolitan Denver, Colorado area would have to be compared with destination resorts in Hawaii, California and Arizona. The Colorado Biltmore would not have been able to compete with those area resorts for golf business in the winter, and would have had serious competition for local Colorado ski resorts for other

winter sport resort trade.

Other location problems have been discussed under Financing, above.

c. Other factors previously identified. Also discussed above were the lack of a regulation 18-hole golf course, the lack of a high profile hotel operator, and the need for high room rates and high occupancy.

d. Commercial travellers. The pro formas and financial existence of the hotel depended on a relatively high rate of occupancy by commercial travellers during the week nights. There is a great deal of competition in the south

metro area for that kind of business.

e. Land lease. Mr. Laurence Watson, an expert witness for the Plaintiff, testified that the land lease payment arrangement would have been beneficial because the lease costs per year would have been approximately two million dollars less than the payments required if the developer purchased the land.

The lease would have been a serious impediment to selling condominiums since most buyers would want a fee interest. The Plaintiff (through Mr. Tucker) acknowledged the sales difficulty this would create.

-23-

f. Hotel occupancy. Denver area hotels showed a lower occupancy rate then necessary for financial success of the project (See, e.g., Ex. D-345). Mr. Perrett testified to Denver occupancy rates of approximately sixty percent in 1983 and 1984.

g. Actual historical data. The pro formas were based on certain economic assumptions that turned out to be false. Some examples (L&H refers to the Laventhal and Horwath pro formas for the project):

1. The number of first class hotel rooms available in the area increased greatly more than projected by L & H.

2. Actual hotel room demand grew approximately ten percent less than L & H predicted.

3. L & H projected a 76% room occupancy

rate for the 1989 income figures; the actual rate in the area was 53%.

4. The L & H projected room revenue per day was $113 higher that the rate actually achieved.

5. L & H assumed a growth of six percent per year; the actual Denver figure was two percent in first class hotels.

6. The average Denver area first class hotel room rates

were $43 to $105 lower per year between 1987 and 1991 than the L & H projections.

7. Comparisons of actual figures for Arizona resort hotels with the L & H projections for the Colorado Biltmore similarly showed that the projections were much higher than actual for room rate increases, room rates, room revenues, and occupancy.

8. If the hotel had operated in the real world of historical data with the efficiency projected by L & H, the project would have lost $39.5 million in the five years from 1987 through 1991.

9. The cost of financing, if obtained, would probably have been higher than projected because of the factors discussed above and the actual market rates in the early to mid-1980's.

The evidence does not establish by a preponderance

of the evidence that the Plaintiff would have realized any profit from the project, either from operations or sale of the project. The evidence shows that the project was possible and that success was possible. It does not show that the project, if approved by the City as it should have been, probably would have been built or probably would have been successful.

-25-

C. Credibility of Witnesses.

The Court reached certain conclusions about the credibility of various witness which were part of the resolution of conflicting opinions.

1. Daniel McGoldrick. He is very knowledgeable and assertive. However, he was not very thorough in his approach to marketing the project, especially as to various potential lenders. He was not a persuasive witness.

2. Fred Boulineau. He was very knowledgeable and capable and had an impressive record of success with hotel projects. Unfortunately, many of his assumptions about the project were grounded in accountant's projections and not on real-world facts. At times his testimony was inconsistent, waffling, and disingenuously based solely on hindsight.

3. Roy Hutchinson. He was very experienced in the industry, but had very little specific knowledge about this project. His testimony was too general to be very persuasive.

4. William Perrett. His opinions are inherently suspect because of his role as a litigation consultant. Notwithstanding that, he had good factual support for his many opinions.

-26-

5. Laurence Watson. He was a very good, straightforward witness, with good financial background but with limited expertise and background in matters relating to hotels.

II. Conclusions.

A. Claims presented.

The decision in CHRDC II brought an end to the Rule 106 review claim and the need for a declaratory judgment. The first Trial Court had initially dismissed certain claims. This Court then permitted amendment to the complaint to reinstate and add claims. The Court refused to permit the addition of a claim for willful and wanton conduct (Claim V).

The trial began with four claims. At the conclusion of the Plaintiff's case, the claim for a denial of due process (Claim I) was withdrawn and dismissed.

Three claims are now ripe for decision. First is a claim for inverse condemnation (Claim II) which alleges that the restrictions on development were a "taking" under the constitution and require that compensation be paid.

The second claim is a claim for damage to private property (Claim III) based on the Colorado Constitutional

provision

-27-

requiring compensation for property which is "damaged."

The third claim is for a violation of civil rights under Title 42, Section 1983 of the U.S. Code (Claim IV).

Finally, as substantial issues related to these claims, are the issues of causation and damages.

B. Inverse Condemnation

1. Nature of the claim

A claim in inverse condemnation is based on the constitutional requirement that compensation be paid when private property is taken for a public purpose. The constitution imposes a duty to pay, and an action in inverse condemnation forces the government to appropriately exercise its power of eminent domain when it has taken property without compensation. First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987), citing to San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 655, 101 S.Ct. 1287, 1305, 67 L.Ed.2d 551 (1981).

-28-

The constitutional basis for the claim from the Fifth Amendment to the United States Constitution, which provides in pertinent part that

> ... private property [shall not] be taken
> for public use, without just compensation.

It also is based on Article II, Section 15, of the Colorado constitution which provides, in part, that

> Private property shall not be taken or
> damaged, for public or private use,
> without just compensation.

Since the claim originates in the "takings" clause of the constitution, it is to be tried as if it were an eminent domain proceeding. Ossman v. Mountain States Telephone, 184 Colo. 360, 365, 520 P.2d 738, 742 (1974); Northglenn v. Grynberg, 846 P.2d 175, 178 (Colo. 1993). It is therefore for the trial court to determine whether a "taking" has occurred. Id.

2. Lessee interest

Before determining the existence of a "taking," the Court should address the Plaintiff's standing to bring an inverse condemnation claim.

The facts establish that the Plaintiff, Cherry Hills Resort Development Company, is not the owner of the property in question. The property is owned by the Temple H. Buell Trust. That Trust was originally a plaintiff in this case but was dismissed after the

dispute over the validity of the City imposed conditions was resolved by the Supreme Court in CHRDC II in April 1990. The Trust never expressly assigned to the Plaintiff any of the

Trust's rights to pursue this claim.

The Plaintiff, CHRDC, has rights in the property only by virtue of a contract with the Trust to develop the resort and lease the property to future tenants.

These facts raise the question whether the Plaintiff, as a property developer or a lessee, has standing to bring an inverse condemnation claim. The Court determines that it does not.

> Colorado law is clear that an action for damages for taking of a property right is personal to the owner of the property in question unless it is specifically assigned to the grantee of the property.

Majestic Heights Co. v. Board of County Commissioners, 173 Colo. 178, 476 P.2d 745, 748 (1970). Similarly, Ossman, supra, 520 P.2d at 742 provides that a landowner is the one possessing the rights to seek redress in inverse condemnation. Gyrnberg, supra, 846 P.2d at 178, refers repeatedly to the "owner" of the property as the one who has suffered a "taking."

Although that language is clear, it arises from determination of the question of which owner possessed the right to sue: the owner at the time of suit, or the owner at the time the taking occurred and was known.

Somewhat closer to the factual situation of this case is Gifford v. Colorado Springs, 815 P.2d 1008 (Colo. App. 1991). In that case, the lessee of a restaurant brought suit in

inverse condemnation against the condemning authority. The Court found that the right to compensation is personal to the owner and that the apportionment of that award to a lessee is not of concern to the condemnor. Id. at 1011. The Court concluded that the right to compensation for loss of access "is exclusive to the owner of property as a matter of law...." Id. at 1012. (Again, although the legal principles are clearly stated, the background facts distinguish the case because a condemnation award which included the value of the leasehold had already been made.)

This Court concludes that as the holder of a contract right to develop the property, the Plaintiff is not entitled to bring a claim in inverse condemnation.

3. Taking:

The jurisprudence of the "taking" clause has developed as a series of ad hoc decisions, with the necessity for compensation dependent on the particular circumstances of each one. Penn Central Transp. Co. v. City of New York, 428 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L.Ed2d 631 (1978), citing to United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104,

2 L.Ed.2d 1228 (1958). That ad hoc jurisprudence has led to uncertainty.

> Intelligent, well-informed public officials may in good-faith disagree about the validity of specific types of land-use regulation. Even the wisest lawyers would have to acknowledge

> great uncertainty about the scope of this [Supreme] Court's takings jurisprudence.

Nollan v. California Coastal Comm., 482 U.S. 825, 866, 107 S.Ct. 3141, 3164, 97 L.Ed.2d 677 (1987), J. Stevens dissent.

Cases dealing with a governmental regulation that "takes" property uniformly deal with the validity of that regulation. The present case deals with the novel situation of an already declared invalid governmental requirement which was based on a misinterpretation of its own regulations. The Plaintiff has asked the Court to conclude that there has necessarily been a taking because the Supreme Court has already decided that the building permit conditions invalidly deprived the Plaintiff of the right to develop property according to a plan that met existing zoning requirements. The Plaintiff asks the Court to apply a per se rule, holding that by itself, a zoning restriction imposed contrary to the zoning code entitles the owner to damages.

The Plaintiff's request poses a question of first impression in Colorado: whether a governmental regulation which misinterprets

an existing zoning ordinance and therefore deprives an owner of existing property rights is a per se "taking" under the constitution.

It has been uniformly held that diminution in property value, standing alone, does not establish a "taking." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 2663, 57 L.Ed.2d 631 (1978). Diminution of

value of up to 75% and 87 1/2% caused by a zoning law has not been considered a "taking." Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915).

Colorado has adopted the rule, at least as to power lines, that when the taking of a portion of the land causes a reduction of property value to the remainder, the owner should be compensated for all damages that are the natural, necessary, and reasonable result of the taking. La Plata Electric Assoc. v. Cummins, 728 P.2d 696, 700 (Colo. 1986). That situation is not present here.

The general rule has been that if the zoning ordinance deprives an owner of all economically viable use of the land, there has been a constitutional taking. Lucas v. South Carolina Coastal Council, ___ U.S.__,112 S.Ct. 2886, 2893 (1992). In some cases, this means that the owner who is deprived of 100% of the economic use of the land recovers the land's full value, whereas

the owner who is deprived of 95% of the economic value recovers nothing.

The same rule has been applied to a land use permit. The Supreme Court has held that even when a land use permit has been denied,

> there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the

> land in question can it be said that a taking has occurred.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127, 106 S.Ct. 455, 459, 88 L.Ed2d 419 (1985).

The general rule had been relaxed to require compensation when the government has deprived an owner of all economic use for only a temporary period, First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250 (1987), and when it has conditioned the granting of a building permit on the granting of an easement whose purpose lacked a nexus with the purpose of the ordinance in question. Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3151, 3149, 97 L.Ed.2d 677 (1987).

The harshness of that general rule has also been modified to provide that a statute may effect a taking when it frustrates distinct investment-backed expectations. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); Penn Central, supra, 98 S.Ct. at 2659, 2661; Lucas, supra, 112 S.Ct. at 2895, n. 8. In that case, the coal company had sold the surface rights but reserved the coal mineral rights in the property. A statute which prohibited mining of coal near houses (in order to prevent subsidence) made it impracticable to mine the coal and thus nearly completely destroyed the mineral rights which the coal company had reserved. That statute was held to constitute a "taking."

The requirement of a nearly complete destruction of economic interests was followed in other cases. In Armstrong

v. United States, 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960), there was "taking" when the government completely destroyed a materialman's lien. In Hudson Water Co. v. McCarter, 209 U.S. 349, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908), there was a "taking" when a height restriction rendered property wholly useless.

Since the restrictions in this case deprived the developer of only a small portion of the project, there was no "taking" under the theory of the frustration of investment-backed expectations.

-35-

However, Colorado has consistently held that there is no federal or state constitutional right to gain the maximum profit from the use of property. Baum v. City and County of Denver, 147 Colo. 104, 115, 363 P.2d 688, 693 (1961), citing to Euclid v. Ambler, supra; Madis v. Higginson, 164 Colo. 320, 323, 434 P.2d 705 (1967); Nopro v. Cherry Hills Village, 180 Colo. 217, 504 P.2d 344, 350 (1972).

In Nopro, id., the owner of the property immediately south of the property at issue in this case sought to re-zone the property to permit a planned unit development with a density approximately two times that permitted under the current R-1 zoning. The Court found that the economically highest and best use did not determine the validity of a zoning ordinance. The Court re-stated the fundamental rule that in order to show that an ordinance is invalid a property owner

> must show that the enforced restriction upon his property will preclude its use for any purpose to which it is reasonably adapted.

504 P.2d at 349.

Although the focus in the present case is not on whether the zoning decision was valid, it is helpful in a determination of the "taking" question to focus on whether the action of the City precluded the owner's use of the property for any purpose to which it is reasonably adapted.

-36-

For this analysis, the Court must look at the restrictions placed upon the development by the City. As referred to above, there were 21 conditions attached to the City's approval in Resolution 16. (Although there were only 20 listed conditions, condition h. had two parts; for ease of reference, the Court is treating condition h. as two separate conditions.)

The trial court found nine of those conditions to be a valid exercise of the City's power and upheld them. Apparently, the validity of those nine was not contested in the various appeals. Those nine have been and remain valid restrictions upon the project.

The trial court found the other twelve conditions to be invalid because, in essence, the City did not have the power to impose those conditions. The Supreme Court (in CHRDC II) later found that six of those twelve conditions were validly imposed because they were consistent with the plans submitted by the developer. 790 P.2d at 833.

Of the twenty-one original conditions, the only ones which are relevant to the issue of whether the action of the City precluded the owner from reasonable development of the property are the six which the trial court and the Supreme

Court found were invalid. Since the other fifteen were valid restrictions, the developer cannot obtain compensation for those.

-37-

From the date of the imposition of those six conditions in Resolution 16 on September 21, 1982, until the Supreme Court effectively struck those conditions from the approval on April 30, 1990 (in CHRDC II), the developer could have developed the resort subject to those six conditions.

Three of those six invalid conditions would probably have had little impact on the project. Condition e. (requiring payment for off-site intersection improvements) and condition r. (requiring payment for additional fire equipment) would have had only a relatively minor financial impact on the developer and could have been included (albeit only approximately) in the project budget. Condition h. (requiring the developer to negotiate directly with adjacent property owners over minimizing sight and sound impact) would have only required some individual negations and foreseeably some minor changes to the plan.

A fourth condition, condition 1., was central to a great deal of trial evidence, but probably was also of minimal importance. That condition required the developer to submit to the City satisfactory evidence of the developer's financial ability to complete the project. If the developer had complied with that condition, it would have meant that adequate financing had been obtained and that little additional effort had been expended to demonstrate that financing. If the developer was not able to comply with that condition, the project probably would not have

-38-

been built due to the lack of financing. Ultimately, the effect of this condition was probably negligible.

The remaining two conditions, conditions i. and k., are at the heart of the Plaintiff's case. Those conditions prohibited the developer from building condominiums or luxury residences and restricted the project to no more than 600 hotel units totaling a maximum 620,000 square feet.[1] The restrictions on the use of the land are the only ones which could support a finding of a constitutional "taking," or "damaging."

The United States Supreme Court has recognized two discrete categories of regulatory action that constitute a "taking" without regard to the governmental purpose behind the regulation. The first is when there is a "permanent physical occupation" or a physical "invasion" of the property. Lucas v. South Carolina Coastal Council, supra, 112 S.Ct. at 2893; Nollan, supra, 107 S.Ct. at 3146. The second is where the regulation denies all economically viable use of the land. Agins v. Tiburon, supra, 100 S.Ct. at 2141; Lucas, supra, 112 S.Ct. at 2893. Neither of those is present in the instant case.

---

[1] Neither the trail court not the Supreme Court ruled on the appropriateness of the ceiling on the number of hotel units or on the square footage limitations for the hotel. This Court will then accept those restrictions as valid conditions. The invalidity of condition k. was that it did not permit condominiums or luxury residences in addition to the hotel. CHRDC II, 790 P.2d at 829-830.

In Nollan v. California Coastal Commission, supra, 107 S.Ct. at 3148-3149, the United States Supreme Court found that a condition attached to a building permit was the same as a refusal to issue the permit based on the same condition. The Court concluded that the condition must further the same legitimate police-power purpose as would a refusal to issue the permit. Id. A land use regulation is not a taking if it substantially advances legitimate state interests and does not deny the economically viable use of the land to the owner. Ibid., at 3147, citing to Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

Nollan has some surface similarity to the present case. In Nollan, the property owners were issued a building permit which was conditioned on granting to the public an easement to walk along the beach. This easement was based on a California statute which permitted the Coastal Commission to impose on building permits conditions for public access that would prevent adverse impact on public access to the sea.

In a 5-4 decision, the Court held that there was no nexus between access to the beach and access along the beach, and the building permit condition did not substantially advance a legitimate state interest. Even though the end result was a "taking" of only a part of the property which did not deprive the

owners of all beneficial use of the property, the Court held that compensation was due. It was due under those circumstances because the permit condition did not serve the same governmental purpose as the statutory right to ban construction of the house. A land use regulation may

constitute a taking if the regulation is not reasonably necessary for the effectuation of a substantial government purpose. Nollan, supra, 107 S.Ct. at 3147, citing to Penn Central, supra, 98 S.Ct. at 2660.

Colorado has used a similar test. Government action can constitute a taking if it fails substantially to advance legitimate state interests. National Advertising v. Board of Adjustment, 800 P. 2d 1349, 1351 (Colo. App. 1991).

The government purpose behind Resolution 16 is caught in a contradiction. On one hand, a government has a substantial interest in enforcing its own laws and a resolution which improperly enforces those laws does not advance that government interest. On the other, an interpretation of a zoning ordinance, even when erroneous, serves a government purpose when that interpretation advances the same interest as the zoning ordinance.

In Nopro v. Cherry Hills Village, supra, 504 P.2d at 349, the Supreme Court upheld the R-1 zoning on real estate adjoining the property in this case, and found that the objectives of the Cherry Hills zoning plan were to protect a rural lifestyle, preserve open

space, and eliminate noise and traffic congestion.

Resolution 16 was reasonably calculated to further those objectives. Since there was a rational relationship between the Resolution and the legitimate governmental interest behind the zoning, the Court concludes that there was a sufficient nexus between the two.

The Plaintiff has argued that the case of Denver v. Denver Buick, Inc., 141 Colo. 121, 126, 347 P.2d 919 (1959), supports the conclusion that invalid building restrictions amount to a "taking." The Court disagrees.

That case is somewhat similar to the present one because the city imposed off-street parking requirements on selected properties as a condition of development. However, that case is not applicable because the off-street parking ordinance required a property owner to use a portion of the property for a public purpose. The mandated use of property for a public purpose in that case is very different from the restriction on a private purpose in the present case.

The Court does not impose a per se "taking" rule and concludes that there was no taking in this case. This decision is based on three main considerations: the economic usefulness of the property

after the permit decision, the rational basis of the permit decision, and the policy implications of a per se rule.

The first consideration is the economic use of the property with the restrictions in place. Even with the invalid prohibition against condominiums, the developer could have built a resort hotel of up to 600 hotel units. The property was zoned RA-1 and the conditions authorized the building of a residential and resort hotel which was consistent with RA-1 zoning.

The conditions did not forbid the other uses authorized

in an RA-1 zoning district, such as single family residences on two and one-half acre lots, schools, non-profit golf courses, or other recreational uses. Although those uses had not been requested by the developer, they remained as permissible economic uses of the property.

In Grynberg, supra, 846 P.2d at 179, the court refused to reconsider the long-standing principle

> that compensation is not due to a property owner merely if that person's property value is depreciated by government action.

The Court went on to recognize again that a compensable taking could occur if there is a permanent occupation of property or the loss of all economically beneficial or productive use of land, 846 P.2d at 180, n. 5 (Emphasis added).

-43-

This requirement for deprivation of all reasonable economic use of the property has been followed in many Colorado cases. See, e.g., National Advertising v. Board of Adjustment, 800 P.2d 1349, 1351 (Colo. App. 1991); Van Sickle v. Boyes, 797 P.2d 1267, 1271 (Colo. App. 1990).

The second consideration is the rational basis for the decision. The validity of the purpose of the zoning restrictions in this area was upheld in Nopro, supra. Preserving the rural character of the area through zoning regulation was a legitimate exercise of the police power of the City. A building decision which attempts to implement that purpose

is a decision based on a rational basis.

In determining the reasonableness of a government's exercise of its police power, the Court need only find that the government "could rationally have decided" that the restriction imposed might achieve the legitimate governmental objective. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466, 101 S.Ct 715, 725, 66 L.Ed2d 659 (1981). The exercise of police power will be upheld if any known facts or facts which could reasonably be assumed afford support for it. Goldblatt v. Hempstead, 369 U.S. 590, 596, 82 S.Ct. 987, 991, 8 L.Ed.2d 130 (1962).

-44-

Although the Supreme Court has found that the conditions on the approval were invalid, this Court finds that there was a rational basis for the interpretation of the zoning code and a reasonable nexus between the interpretation and the legitimate purposes of the code. Accordingly, that interpretation will not support application of a per se taking rule.

The third consideration is the governmental impact of a per se rule. Local governments make building permit decisions on a daily basis. Those decisions resolve the question of whether a requested use of property is permitted by the existing zoning code. In making that decision, the building official or commission is making a decision which interprets the zoning code.

A per se rule would mean that every building permit decision based on an erroneous interpretation of the zoning code is a "taking" which entitles the applicant to damages for the time the denial was in place. Such a holding would have

an unprecedented chilling effect on a government's ability to make everyday building decisions. The Plaintiff has not provided any case law which directly supports such a rule.

C. Damage to private property.

This claim is based on Article II, Section 15 of the Colorado Constitution, which provides that "Private property shall not be

-45-

...damaged, for public or private use, without just compensation." The Plaintiff has also plead the Article II, Section 3, right to possess and protect property, and the Article II, Section 25, prohibition against depriving a person of property without due process of law.

"Damaging" of property is something different than a partial taking. The inclusion of a requirement for compensation when property has been "damaged" as well as "taken" has been said to afford greater protection to a property owner than the U.S. Constitution. City of Northglenn v. Grynberg, 846 P.2d 175, 179 (Colo. 1993); Mosher v. City of Boulder, 225 F.Supp. 32, 35, (D. Colo. 1964).

The facts of this case do not support the doctrine of compensation for property which has been "damaged." The Supreme Court held in Grynberg, supra, that

The intent of including the word "damage" in the constitution was to grant relief to property owners who had been substantially damaged by the making of such public improvements [as a highway] abutting their

lands, but whose land had not been physically taken by the government.

846 P.2d at 179, citing to City of Pueblo v. Strait, 20 Colo. 13, 18, 36 P. 789, 791 (1894).

-46-

In that Pueblo v. Strait, Id., case, the Court noted that in a majority of the states that had construed a "damaging" clause in their constitution, the court had allowed

> a recovery in all cases where private property has sustained substantial damage by the making of a public improvement.

20 Colo. at 18. In that case the Court required compensation for the damages suffered when a viaduct was built in a public street next to the property in question. The viaduct rendered the property practically inaccessible (It was "closed to access by teams.") from the streets abutting the property. Id. at 17.

The Court in Pueblo v. Strait went on to list prior cases where compensation had been awarded in a "damaging" case. Id., at 19-21. The Court in Grynberg, supra, did the same. Those listings showed that nearly all cases involved an improvement or activity on the adjoining property which deprived the suing property owner of access to or from his or her lot.

One exception to that general category of access deprivation was Game and Fish Commission v. Farmers Irrigation Co., 149 Colo. 318, 369 P.2d 557 (1962). In that case the Court held that a claim under the "taken or damaged"

clause had been stated in a complaint which alleged that the Commission had discharged pollutants upstream from the irrigation company's water source.

-47-

These cases led the Court to the rule that a Plaintiff could not recover for the damages that were common to the general public, but would recover for damages that are different in kind than those suffered by the general public, e.g., loss of access to a particular lot. Strait, supra, 20 Colo. at 20; Grynberg, supra, 846 P.2d at 179.

The Court in Grynberg, id, further pointed out that

> In no case has mere depreciation in value been grounds to award just compensation for a damaging of property.

In the instant case, there has, at most, been an action by the City which has reduced the value of the Plaintiff's property. Accordingly, the Plaintiff cannot recover for a constitutional claim of "damaged" property.

D. Deprivation of Civil Rights.

This is a claim brought pursuant to Title 42, U.S.C. Section 1983. That section provides (in paraphrased summary) that 'Every person who, under color of law, deprives another person of any rights or privileges secured by the laws or Constitution of the United States, is liable to the person injured.'

-48-

For purposes of this case, the Defendant City is a "person" who could deprive another and be liable to another (a defendant under the statute). Monell v. Department of Social Services, 436 U.S. 685, 98 S.Ct. 2018, 56 L.Ed2d 611 (1978); Uberoi v. University of Colorado, 713 P.2d 894, 900 (Colo. 1986); Wigger v. McKee, 809 P.2d 999, 1003 (Colo. App. 1991).

It is undisputed that the City Council was acting in its official capacity when it passed Resolution 16. It follows, therfore, that the Defendant City was acting under color of law.

The Court also concludes that the Plaintiff, as a partnership, is a "person" entitled to bring a Section 1983 claim. See, e.g., San Bernardino Physicains' Service Medical Group v. San Bernardino, 825 F.2d 1404 (9th Cir. 1987) (a business corporation is a "person").

The only issues for resolution are whether there has been 1) a deprivation, 2) of a right or privilege secured by United States law. (The right or privilege enforceable under Section 1983 must arise from the federal constitution or from a federal statute, and not solely from the state constitution or statutes. Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980);Espinosa v. O'Dell, 633 P.2d 455, 460 (Colo. 1981).)

The Court accepts that it is the law of this case that a plan which meets all zoning requirements must be unconditionally approved by the City unless there is authority to impose additional conditions. CHRDC II, supra, 790

P.2d at 832.

However, a Section 1983 plaintiff must possess a federal constitutional or statutory right, not merely a state case law right.

1. Existence of a federal right.

The issue presented is whether the disapproval of a development plan or the attachment of conditions to the approval of the plan can give rise to a constitutional claim. This is another question of first impression in Colorado. In addition, the federal circuit courts are not unanimous in this area.

In Littlefield v. City of Afton, 785 F.2d 596, 607 (8th Cir. 1986), the Eighth Circuit concluded that denial of a building permit may give rise to a substantive due process claim. The court held that a substantive due process claim under the Fourteenth Amendment had been stated when the plaintiffs alleged that the city had imposed an unconstitutional condition on the granting of the permit. That decision was based on the conclusion that the plaintiffs had a constitutionally protected property interest because state law required the issuance of a permit when the

applicants have complied with the ordinances. Id. at 602.

The Littlefield court then summarized and discussed the existing case law. The court concluded that the Third, Fourth, Sixth, Ninth and Eleventh Circuits had held that a substantive due process claim could be based on the denial of a land use permit, Id. at 606, and that the First Circuit had consistently held that a Section 1983 claim could not be

based on a denial of a permit, Id. at 604.

(This Court notes that the Eleventh Circuit has since Littlefield identified circumstances where there is not a protected property interest in a building permit. Marine One, Inc. v. Manatee County, 877 F.2d 982 (11th Cir. 1989).)

In Colorado, CHRDC II, supra, 790 P.2d at 832, establishes that the Plaintiff in this case had a right to receive unconditional approval of the development plan once it had complied with all the ordinances. This is identical to the state law underlying Littlefield.

This Court finds the reasoning of Littlefield to be persuasive and holds that the Plaintiff CHRDC possessed a Fourteenth Amendment right to substantive due process to have the development plan approved without the six invalid conditions.

-51-

2. Deprivation of that constitutional right.

The statute, 42 USC § 1983, requires merely that a person "be subjected...to the deprivation of any rights...." On its face, it would seem to make even an accidental deprivation actionable.

The Court in Littlefield, supra, 785 F.2d at 600, stated that one of the elements of a Section 1983 claim was that the plaintiff was denied a right "arbitrarily, capriciously, or illegally." It then went on to recognize that a court may intervene in a zoning dispute only when the action of the zoning commission "is arbitrary and capricious, having no substantive relation to the general welfare." 785 F.2d at 607.

The United States Supreme Court has also grafted a construction on the type of act which will be an actionable deprivation. In connection with a procedural or substantive due process claim the Court held that lack of due care would not be sufficient to invoke the protection of the Fourteenth Amendment. Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed2d 662 (1986).

The Colorado Supreme Court has similarly rejected a negligence standard for a due process violation, and held that a Fourteenth Amendment due process claim may be brought only for gross negligence, recklessness, or intentional conduct. Uberoi v.

-52-

University of Colorado, 713 P.2d 894, 903 (Colo. 1986).

It remains, then, to determine whether the deprivation in this case was inflicted by gross negligence, recklessness or intentional conduct. (The Court has not considered the evidence on this point which the Plaintiff submitted after the trial.)

The City had enacted the RA-1 zoning ordinance in 1958. That ordinance referred to "transients as guests," residents who are "not predominately [sic] permanent (in the sense of continuous year-round tenancy)," and residents who "do not have exclusive possession and control of the rented facilities". In determining the appropriateness of the development plan, the City had to apply that language, which, on its face, is not entirely clear.

Before passing on the question, the City sought the

advice of counsel, who gave the opinion that residential condominiums were not permitted by the zoning ordinance.

After the first trial judge disagreed with that opinion, the Defendants presented the issue to a panel of the Court of Appeals and those three judges interpreted the ordinance the same way the City had.

There have been no allegations of particular acts which might have been intentional or willful conduct, malicious conduct,

-53-

reckless conduct, or gross negligence.

The Court concludes that the evidence does not establish by a preponderance of the evidence that the Defendant acted intentionally, recklessly, or with gross negligence. Accordingly, the Plaintiff has failed to prove an actionable deprivation under Section 1983 and the claim fails.

E. Damages.

The most telling fact concerning the request for damages is that the Plaintiff had the right to develop the project without the condominiums from the passage of Resolution 16 until the decision in CHRDC II. In 1983 the Plaintiff believed that the project as approved was financeable and workable, i.e., economically feasible. Nonetheless, the Plaintiff chose to pursue the entire project and not to pursue actual development of that portion of the project that had been approved.

The measure of damages for a regulatory taking is the value of the use of the land during the taking. State Dept. of Health v. The Mill, 809 P.2d 434, 438 (Colo. 1991), citing to First English Evangelical Lutheran Church v. Los Angeles, supra, 482 U.S. at 319, 107 S.Ct. at 2388.

-54-

The Eleventh Circuit has found that that value can be expressed by the difference between the fair market value of the right to develop the property at the time the restrictions were lifted and the fair market value at the time the restrictions were imposed. Wheeler v. City of Pleasant Grove, 896 F.2d 1347, 1351 (11th Cir. 1990) (Wheeler IV), or by the return on the portion of fair market value that was lost as a result of the regulatory restriction. Wheeler v. City of Pleasant Grove, 833 F.2d 267, 271 (11th Cir. 1987), (Wheeler III).

The heart of any measure of damages for these claims is to make the property the focus of the inquiry rather that the speculative aspirations of the potential developer. Wheeler III, supra, 833 F.2d at 270. In the case at bar, the focus has to be on the property in the real world, with the project as desired and as approved.

There has been no evidence of the fair market value of the opportunity to develop the land as it had been approved. There was evidence of the value of the Agreement to Lease, but none as to the value with the project as approved. There is no foundation from which the Court could calculate a loss of fair market value as a measure of the value of the use of the land.

The evidence does not establish by a preponderance of the evidence and value for the use of the land. The

Plaintiff has

contended that it would have received a developer's fee from the funding of the project and therefore the use of the land by the Plaintiff was worth at least the amount of the developer's fee. However, before the Court could award that fee, the Court would have to find that the Plaintiffs probably would have obtained funding.

As the Court concluded as a matter of fact, there was only a small chance, only a possibility that the Plaintiff could have obtained funding for the project either with condominiums or without. The Plaintiff has not proven that it would have realized any value from the land.

The court is aware that the letter from the Trust on December 13, 1982, which offered to modify the Agreement to Lease did not form a new contract between the Trust and the Plaintiff. The Plaintiff never did enter into a new agreement with the Trust to develop the project as approved by the City in Resolution 16. However, the Trust's expressed willingness to modify the Agreement coupled with the Plaintiff's assurances that such a project could be financed and operated, convince the Court that the Plaintiff had no contractual impediments to proceeding with the project after December 13, 1982.

These facts lead to the additional conclusion that the Plaintiff had no contractual ability to construct the project for

the twelve week period between the passage of Resolution 16 on September 21, 1982, and the Trust's expression of willingness to go forward on December 13, 1982.

If a taking had occurred, it would be possible to interpret the evidence to say that the taking lasted for that twelve week period. For that period, there is also no foundation for concluding that the Plaintiff suffered any damages.

The same measure of damages would be used for a regulatory "damaging" and the Court again finds no probability of damages.

The measure of damages for a Section 1983 substantive due process claim is the same as for a "taking" claim. Wheeler III, supra, 833 F.2d at 270, n. 3; Lake Nacimiento Ranch Co. v. San Luis Obispo, 841 F.2d 872 (9th Cir. 1988).

The Plaintiff also requested damages for reimbursement of out-of-pocket costs and for the time spent on the project. Those damages would not be awarded under any of the three claims. Wheeler III, supra; United States v. General Motors Corp., 323 U.S. 373, 378, 380, 65 S. Ct. 357, 359, 89 L.Ed 311 (1945) (The owner's loss is measured by the extent to which the government has deprived him of an interest in property.) City and County of Denver v. Hinsey, 177 Colo. 178, 493 P.2d 348, 351 (1972) (Injury to a business is not part of just compensation).

The Plaintiff also requested damages for loss of developer's equity return on the project, or a portion of

profits. Loss of profits is not an element of just compensation under either the federal or state constitutions. Auraria Businessmen v. Denver Urban Renewal Authority, 183 Colo. 441, 517 P.2d 845, 847 (1974). As concluded above, the evidence does not establish that there would have been any profits to receive.

Finally, the Court has concluded that the restrictive conditions did not cause any loss to the Plaintiff. Neither the restrictive conditions nor the pending lawsuit caused the project to remain unfinanced and undeveloped.

III. JUDGMENT.

The Court enters judgment for the Defendant, City of Cherry Hills Village, and against the Plaintiff, Cherry Hills Resort Development Company, on all the remaining claims.

The Court enters judgment for the Plaintiff, Cherry Hills Resort Company, against the Defendant, City of Cherry Hills Village, for costs.

The Plaintiff may receive a portion of its costs. Although the Plaintiff was not successful in any of its claims for damages, the Plaintiff did prevail on its claim under Rule 106 that the

restrictive conditions were invalid. That was the predominating claim in this litigation, and the Plaintiff is entitled to costs under Section 13-16-111, C.R.S. Because there were multiple counts, the Court will use its discretion and award only a portion of the Plaintiff's costs as authorized by Section 13-16-109.

In additional the individual City Council Defendants who were dismissed are entitled to recover their costs, if any, pursuant to Section 13-16-110.

Any party requesting costs must submit a bill of costs pursuant to CRCP 121 Section 1-22.

DONE this 13th day of October, 1993.

BY THE COURT:

/s/ Kenneth K. Stuart
JUDGE KENNETH K. STUART

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order was placed in the U.S. mail, postage prepaid this 13 day of October to the following:

James Kreutz
Suite 200
5655 South Yosemite
Englewood, Co. 80111

Robert L. Morris
P. Kathleen Lower
Suite 630
7800 East Union Ave.
Denver Technological Center
P.O. Box 37090
Denver, Co. 80237

/s

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO
Case No. A82CV603, Division 4

ANSWER

CHERRY HILLS RESORT DEVELOPMENT COMPANY,
a Colorado limited partnership, et al.,

Plaintiffs,

v.

THE CITY OF CHERRY HILLS VILLAGE, et al.,

Defendants.

Defendants answer the complaint as follows:

1. Deny paragraph 1 for lack of knowledge or information sufficient to form a belief as to the truth or falsity thereof.

2. Deny paragraph 2 for lack of knowledge or information sufficient to form a belief as to the truth or falsity thereof.

3. Deny paragraph 3 for lack of knowledge or information sufficient to form a belief as to the truth or falsity thereof.

4. Admit paragraph 4.

5. Admit the portion of paragraph 5 preceding the semi-colon, and the portion of the sentence following the semi-colon as it relates to Merle Chambers, but deny the remainder of the paragraph.

6. Admit paragraph 6, except deny that the portion of the Property zoned RA-1 is 66.8 acres or 2,909,808 square feet and aver that it is 68.8 acres or 2,996,928 square feet, deny that the portion of the Property zoned R-1 is 49.06 acres and aver that it is 47 acres, and further aver the R-1 or F-1 permitted uses in the RA-1 portion of the Property are "subject to the other requirements" of R-1 and F-1 zoning.

7. Admit paragraph 7, except deny the last sentence of the paragraph, and aver that all building limitations applicable to R-1 and F-1 zoning districts are applicable to R-1 and F-1 uses in an RA-1 district.

8. Deny paragraph 8.

9. Admit that the quotation of Section 6-11-4 is accurate as of the time of the filing of the complaint, and aver that Section 6-11-4, and all of the City Code, speaks for itself.

10. Admit so much of paragraph 10 as alleges that on or about August 26, 1981 (in fact, under cover of a letter dated August 31, 1981) a document designated Master Plan Approval Request was submitted to the City of Cherry Hills Village Planning and Zoning Commission, deny that it was submitted by the Developer, aver that it was submitted by Tucker/Bolineau Development Corporation, and deny the

remainder of the paragraph.

11. Admit paragraph 11, except deny that the Planning and Zoning Commission considered the Master Plan at a meeting held on September 9, 1981, and aver that the meeting was held on September 8, 1981.

12. Deny the first sentence of paragraph 12, and aver that by resolution dated March 16, 1982, the City Council approved only "the general concept of a resort hotel to be constructed on land owned by the Temple H. Buell Trust as set forth in a Master Plan presented to the City," that such approval was expressly subject to the understanding that, "before any formal actions are taken by the City to amend its Zoning Regulations or to grant approval for a building permit on said project, the Master Plan must be revised to the satisfaction of the City Council as set forth in the following sections," and that the Planning and Zoning Commission was directed "to continue its review of the proposed resort hotel development" and to "work with the developer to arrive at a revised Master Plan for this project that is within the parameters stated above," and admit the second sentence of the paragraph.

13. Admit paragraph 13, except deny that the action was taken "virtually without discussion of the matter" and further deny that the Council rescinded the "approval" given on March 16, 1982, and aver that the Council unanimously resolved to rescind the resolution passed on March 16 to allow the new Council to reconsider the matter.

14. Paragraph 14 was struck by order of the Court dated September 22, 1983.

15. Paragraph 15 was struck by order of the Court

dated September 22, 1983.

16. Paragraph 16 was struck by order of the Court dated

September 22, 1983.

17. Admit so much of paragraph 17 as alleges that a request was made to City Council to approve two alternative plans designated the Preferred Plan and the Conformance Plan, admit the second sentence of the paragraph, deny the remainder of the paragraph, and aver that the plans were submitted to Council by Tucker/Bolineau Development Corporation at the Council meeting on June 15, 1982 and approval was requested in a letter dated July 29, 1982 from Tucker/Bolineau's law firm, Holme Roberts & Owen.

18. Admit paragraph 18.

19. Admit paragraph 19, except deny, for lack of knowledge or information sufficient to form a belief as to the truth or falsity therof, the allegations concerning "other amenities customarily found in a first class Residential/Resort Hotel."

20. Admit paragraph 20, except deny the third sentence for lack of knowledge or information sufficient to form a belief as to the truth or falsity therof.

21. Deny paragraph 21 for lack of knowledge or information sufficient to form a belief as to the truth or falsity therof.

22. Admit paragraph 22.

23. Deny the first sentence of paragraph 23, deny the fourth sentence of the paragraph for lack of knowledge or information sufficient to form a belief as to the truth or falsity thereof, and admit the remainder of the paragraph.

24. Deny paragraph 24, except admit that the Conformance Plan was resubmitted to the City Council at its meeting on September 21, 1982 and that a copy of the Council's resolution is attached to the complaint as Exhibit D, aver that the City Council only "preliminarily approve[d] the general concept of the proposed resort hotel as set forth in what has been commonly referred to as the Conforming [sic] Plan," and only subject to certain conditions and restrictions, and further aver that certain of the conditions and restrictions later were determined by the Colorado Supreme Court to be invalid.

25. Admit paragraph 25, except deny the last sentence of the paragraph.

26. Admit that the quoted portions of the resolution are accurate, but deny the remainder of the paragraph, except aver that the Colorado Supreme Court has determined that the quoted

conditions are invalid.

27. Admit the first sentence of paragraph 27, aver that Section 6-11-4 refers to approval of "complete" plans, which never were submitted by plaintiff to the City at any time prior to commencement of this litigation, deny the remainder of the paragraph, and aver that the Colorado Supreme Court

has affirmed the validity of all of the conditions listed in paragraph 27 except condition (1).

28. Admit so much of paragraph 28 as alleges that five and a half of the 20 conditions contained in the resolution were determined by the Colorado Supreme Court to be invalid, but deny that any of the conditions failed to bear a rational relationship to a legitimate interest of the City.

COUNT I -- RULE 106 REVIEW

29. Incorporate their answers to paragraphs 1 through 28 of the complaint.

30. Deny paragraph 30.

31. Admit paragraph 31.

32. Deny paragraph 32.

COUNT II -- DENIAL OF PROCEDURAL DUE PROCESS

33. Incorporate their answers to paragraphs 1 through 28 of the complaint.

34. Admit paragraph 34

35. Deny paragraph 35.

COUNT III -- DECLARATORY JUDGMENT

36. Incorporate their answers to paragraphs 1 through 28 of the complaint.

37. Admit paragraph 37.

38. Deny for lack of knowledge or information sufficient to form a belief as to the truth or falsity thereof so much of paragraph 38 as alleges that plaintiffs are interested persons, and deny the remainder of the paragraph.

39. Admit paragraph 39, except deny the allegation

regarding plaintiffs' suffering for lack of knowledge or information sufficient to form a belief as to the truth or falsity thereof.

40. Admit paragraph 40, except deny the allegation regarding uncertainty on the part of defendants.

41. Deny paragraph 41.

42. Deny paragraph 42 except insofar as it concerns conditions on the Conformance Plan already determined by the Colorado Supreme Court to be invalid.

COUNT IV -- INVERSE CONDEMNATION

43. Incorporate their answers to paragraphs 1 through 28 of the complaint.

44. Admit paragraph 44.

45. Deny paragraph 45.

46. Deny paragraph 46.

47. Deny paragraph 47.

48. Deny paragraph 48.

49. Deny paragraph 49.

50. Deny paragraph 50.

51. Deny paragraph 51.

COUNT V -- DAMAGE TO PRIVATE PROPERTY

52. Incorporate their answers to paragraphs 1 through 28 and 44 through 51 of the complaint.

53. Deny paragraph 53.

54. Deny paragraph 54.

55. Deny paragraph 55.

56. Deny paragraph 56.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim for inverse condemnation.

SECOND AFFIRMATIVE DEFENSE

The complaint fails to state a claim for damage to private property.

THIRD AFFIRMATIVE DEFENSE

At all times relevant hereto, the actions of defendants were undertaken pursuant to the statues and laws of the state of Colorado, the ordinances of Cherry Hills, and were undertaken in good faith. As a consequence, plaintiffs' monetary damages claims are barred by the doctrine of official immunity.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to mitigate their damages.

Dated: August 1, 1991.

MORRIS & LOWER

By /s/ P. Kathleen Lower
Robert L. Morris #6964
P. Kathleen Lower #14192

Suite 630
7800 East Union Avenue
Denver Technological Center
P.O. Box 37090
Denver, Colorado 80237-0090
(303) 779-4664

Attorneys for defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 1991, a true and correct copy of the foregoing ANSWER was deposited in the United States mail, postage prepaid, addressed to the following:

James K. Kreutz, Esq.
James K. Kreutz & Associates, P.C.
Suite 200
5655 South Yosemite
Englewood, Co. 80111

Richard D. Greengard, Esq.
Greengard, Senter, Goldfarb & Rice
Suite 700
400 South Colorado Boulevard
Denver CO 80222

/s/ P. Kathleen Lower

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO
Civil Action No. A 82 CV 603, Division 4

FIRST AMENDED COMPLAINT

CHERRY HILLS RESORT DEVELOPMENT COMPANY,
a Colorado limited partnership,

Plaintiffs,

vs.

THE CITY OF CHERRY HILLS VILLAGE, THE CITY OF CHERRY HILLS VILLAGE CITY COUNCIL, ROBERT ST. CLAIR, ROY A. WATTS, THEODORE B. WASHBURNE, GEORGE ANDERMAN, ANN M. POLUMBUS, DONALD J. EGAN, MERLE CHAMBERS, JOAN R. DUNCAN, VIOLA LAHANA, GEORGE B. SECOR, BRUCE G. SMITH, DEBORAH S. JULANDER, and FORREST MCGRATH, past and present members of the City of Cherry Hills Village City Council,

Defendants.

Plaintiffs complain as follows:

PARTIES

1. Cherry Hills Resort Development Company

(the "Developer") is a Colorado limited partnership. Fortune Investments of Colorado, Inc., a Colorado corporation is the general partner of the Developer and Fred M. Boulineau and Stephen L. Tucker are its limited partners.

2. The Developer is (by virtue of an assignment from Tucker/Boulineau Development Corporation, an Arizona corporation, and Fred Boulineau Associates, Inc., an Arizona corporation), a party to an Agreement to Lease dated October 11, 1980, as amended, which entitles it, under certain circumstances to become the tenant under two ground leases covering in the aggregate, all of the Property.

3. Defendant, the City of Cherry Hills Village (the "City") is a municipal corporation and a home rule city within the State of Colorado.

4. Defendant, City of Cherry Hills Village City Council (the "Council"), is composed of the duly elected, qualified and acting members of the City Council of the City of Cherry Hills Village from 1982 to date; Defendants, Robert St. Clair, Roy A. Watts, Theodore B. Washburne, George G. Anderman, Ann M. Polumbus, Donald

J. Egan, Merle Chambers, Joan R. Duncan, Viola Lahana, George B. Secor, Bruce G. Smith, Deborah S. Julander, and Forrest McGrath, are the past and present members of the Council.

ZONING

5. Since 1958, the Property has been zoned as

follows:

(a) 66.8 acres (2,909,808 square feet) are zoned RA-1, Resort Area District. Permitted uses in such district are:

(i) Residential and Resort Hotel, which is defined as:

"A building, or associated group of buildings, designed for the entertainment of transients as guests for compensation, the residents of which are not predominately permanent (in the sense of continuous year-round tenancy), and do not have exclusive possession and control of the rented facilities, and the conveniences and facilities of which include, but not by way of limitation, public dining areas, meeting rooms and facilities, retail outlets, room service and housekeeping and maid services. No more than twenty five percent (25%) of the rooms available for rent shall have cooking facilities."

(ii) Any use permitted in an R-1, 2-1/2, Acre Residential District, and

(iii) Any use permitted in an F-1

Flood Plan and Recreation District.

Accessory Uses retail outlets and structures or uses customarily incident to the above uses

(b) 48.98 acres are zoned R-1, 2-1/2 Acre Residential District.

6. Under the RA-1 Zone as presently in effect, the height, acre and minimum yard requirements are as set forth below:

A. Height Regulations:
Principal structure - 90'
Accessory structure - 30'

B. Area Regulations: No more than ten percent (10%) of the total land area shall be occupied by structures of any type.

-2-

C. Minimum Yard Requirements: All structures shall be set back at least two hundred feet (200') from all property lines and zone district boundaries.

Except as set forth above, and for the approval requirement described in paragraph 9 below, the City's zoning code does not impose any building limitations on structures within an RA-1 Zone.

7. Under the height and area restrictions set forth above, the building structures permitted on the portion of the Property zoned RA-1 may contain up to 2,618,827 square feet, subject only to the approval required as set forth in paragraph 9 below.

8. Section 6-11-4 of the City's zoning code provides as follows:

> "PLAN APPROVAL REQUIRED: No building permit shall be issued for any construction within an RA-1 Resort Area District until complete plans are approved (which approval shall not be unreasonably withheld) by the City Council, with the advice of the Planning and Zoning Commission, after consideration of the compatibility of the proposed plans with the City's Master Plan, this Title, and existing structures and uses in the neighboring area. These plans must include the location, height and area of all proposed structures, outdoor signs and lighting, as well as the location and details of recreational areas and all accessory structures and roadways." (Emphasis added.)

THE APPROVAL PROCESS

9. On or about August 26, 1981, the Developer submitted its Master Plan Approval request (the "Master Plan") to the City of Cherry Hills Village Planning and Zoning Commission ("P and Z") as the first step in obtaining approval of its plans for a Residential Resort Hotel to be constructed on all or a portion of the Property as required by Section 6-11-4 of the City's zoning code.

10. During the period from August 31, 1981 to September 21, 1982, the Master Plan was presented to and/or discussed on numerous occasions by P and Z and the City Council, including the following:

-3-

Meetings at which P & Z considered the Master Plan	Meetings at which City Council considered the Master Plan
September 9, 1981	March 2, 1982
October 13, 1981	March 16, 1982
November 10, 1981	April 12, 1982
July 13, 1982	May 4, 1982
	May 18, 1982
	June 15, 1982
	August 3, 1982
	August 17, 1982
	September 7, 1982
	September 21, 1982

11. On March 16, 1982, the City Council (which then consisted of Mayor Beth Jenkins, and Council members Charles Schloss, Jeff Welborn, Donald J. Egan, Roy A. Watts, Theodore B. Washburn and George G. Anderman) adopted a resolution giving conceptual approval to the Master Plan. Three members of the City Council (Mayor Jenkins and Council members Schloss and Welborn) did not stand for reelection at the City's April 6, 1982 election, and they were replaced by new Council members Robert St. Clair, Ann M. Polumbus and Merle Chambers.

12. On April 12, 1982, at the first City Council

meeting held after the April 6, 1982 election, the new City Council, virtually without discussion of the matter and without hearing any presentation of the Plaintiffs, rescinded the approval given on March 16, 1982.

13. During May 1982, an initiative campaign was commenced by certain residents of the City for the purpose of downzoning the RA-1 portion of the Property to R-2. Upon information and belief, one of the proponents of the initiative has stated that she was asked to conduct such campaign by unidentified members of City Council.

14. The initiative campaign resulted in a City election being held on August 17, 1982 on the proposition to downzone the RA-1 portion of the Property. At the election, the downzoning initiative was soundly defeated, with 71 percent of the voters voting against the downzoning proposal.

15. During the course of the campaign on the downzoning initiative, the Developer's plans for the Residential/Resort Hotel to be constructed on the Property were thoroughly presented to the residents of the City, and the pros and cons of such plans were thoroughly discussed. The campaign generated a great deal of community interest, and an unusually high percentage of the City's residents voted in that election.

16. On August 3, 1982, the Developer asked City Council to approve two alternative plans for a Residential/ Resort Hotel Complex on the Property. One plan, which was designated as the "Preferred Plan," required certain zoning changes which the City was not willing to grant, and is not relevant to this action. The other plan, designated the

"Conformance Plan" conformed to all of the requirements of the City's zoning code.

17. The Residential Resort Hotel contemplated by the Conformance Plan was designed by Taliesin Associated Architects, a division of the Frank Lloyd Wright Foundation. It calls for a Residential/Resort Hotel containing 600 hotel rooms and 200 residential units all of which are to be constructed on the RA-1 land. The structures included in the Conformance Plan are located within the 10 percent building limitation, comply with the 90-foot height limitation set forth in the City's zoning code, and comply with the set back requirements of the City's zoning code.

18. The Conformance Plan submitted to City Council calls for a 9 hole golf course, 10 tennis courts, 2 swimming pools, a health club, restaurants, shops, conference facilities and other amenities customarily found in a first class Residential/Resort Hotel.

19. The height of the buildings in the Conformance Plan has been kept well below the 90 foot limit. Only one chimney extends to 90 feet. More than 50 percent of the building structures have been kept below 45 feet in height. The resort hotel has been oriented to present its narrower side to the majority of neighboring lots. The floors of the hotel and luxury residences step back and rise gradually to the top floor so as to present a low profile to the surrounding community. The design concept clusters the residential/resort village around garden courts, which are at lower levels on the site to take advantage of the natural slope and to minimize the profile of structures above grade. The Conformance Plan calls for underground parking for 1020 cars.

20. The architectural character of the project is

sensitive to the residential character of the City. Tile roofs with broad overhangs, projecting balconies and trellises provide a quiet sense of shelter, human scale comfort and security. Stone chimneys are combined with stucco in earth tone colors to create the effect of an attractive low profile, spread out country mansion and village cluster look. The use of dormer windows has made it possible to locate the top story of the hotel and residential complex within the roof. This has the effect of making the project appear one story lower than it really is as well as enhancing its residential design character.

-5-

21. The Conformance Plan calls for an eight acre lake which is integrated into the project. The entrance to the hotel is one story below lake level. The covered entrance plaza contains a luxurious garden, pools and fountains.

22. The residential portion of the project, which is customarily incident to a resort hotel complex, is contiguous with the resort hotel. The design is integrated with the hotel concept, includes the use of tile roofs, stone walls and earthtone stucco. A variety of apartment type residential units are to be provided ranging in size from 2,000 to 6,000 square feet. A high level of privacy and security is provided to these units. Amenities include an enclosed private swimming pool, a spa, billiard room, card room, library and spacious lobby. Residents will have direct access to all of the hotel amenities as well as recreational facilities. All parking for residential units is underground.

23. The Conformance Plan was resubmitted to City Council on September 21, 1982, at which time it was approved by a vote of 3 to 2 in the form of a resolution (the "Resolution"). However, the City made the approval subject to twenty

"conditions and restrictions," many of which are unfair, unreasonable, exceed the jurisdiction of the City and constitute an abuse of the City's discretion. Consequently, by attaching to its approval certain unreasonable and unlawful conditions, the City has unreasonably restricted its approval of the Conformance Plan.

24. The Defendants, despite the vote of its constituents favoring the project, and the approval of the prior City Council, did place such restrictions on their approval so as to render it impossible to go forward with the project and did so knowing the Plaintiffs could not comply with such restrictions thereby doing indirectly what they could not do directly. Such action was malicious, in bad faith, detrimental and damaging to the Plaintiffs for which these Defendants should be held liable.

THE RESIDENCE ISSUE

25. The Conformance Plan calls for 200 luxury residences to be included as part of the Residential/Resort Hotel. The Developer would prefer that these residences be created in the form of leasehold residential condominium units. Alternatively, the residences would be operated as residential apartment units which would be leased to persons desiring residential accommodations in the City . The City has advised the Developer that in its opinion no permanent residences of any kind may be located within the RA-1 zone as part of the Residential/Resort Hotel.

26. One of the restrictions set forth in the Resolution states:

> Paragraph (i) This preliminary approval is granted with the specific understanding and condition that the City's current zoning code does not permit for this project condominiums, timesharing units, luxury residences or other long term arrangements in the sense of continuous year round tenancy.

A second restriction states:

> Paragraph (k) The entire project shall not exceed 600 hotel units totalling a maximum of 620,000 square feet.

By virtue of the restrictions set forth above, the City has unreasonably withheld its approval of the 200 residential units included as an integral part of the Conformance Plan.

INVALID RESTRICTIONS

27. Section 6-11-4 of the City's zoning code allows the City to withhold approval of plans after consideration of compatibility of the plans with (a) the City's Master Plan, (b) the City zoning code and (c) existing structures and uses in the neighboring area. The City is now allowed to disapprove plans based upon other factors. The Resolution contains restrictions which are invalid because, among other things, they are not based upon the factors which the City zoning code directs the City to consider. The following are examples of such restrictions:

> "Paragraph (b) Recreational facilities shall include not less than nine tennis courts, one swimming pool, one outdoor skating rink, health club, and nine-hole executive golf course.

Paragraph (c) Parking facilities shall include underground parking for at least 1,150 vehicles and surface parking for not more than 370 vehicles.

Paragraph (f) The nine-hole golf course shall as proposed be provided generally at the northwest area of the project.

Paragraph (l) Developer shall submit to the City satisfactory evidence of its financial ability to perform and complete the entire project.

Paragraph (m) As claimed by the Developer the proposed resort hotel shall be of the highest quality comparable to the Mobil Five-Star designation.

-7-

Paragraph (n) Retail outlets shall be of the highest quality appropriate to the Mobil Five-Star hotel designation.

RESTRICTIONS CONSTITUTING AN ABUSE OF DISCRETION

28. The Resolution contains restrictions which constitute an abuse of discretion and which fail to bear a rational relationship to a legitimate interest of the City, including those set forth in subparagraphs (h), (i), (k), and the funding portion of (e) of the Resolution.

29. The Colorado Supreme Court in its Opinion rendered on or about the 23rd of May, 1990, found the acts of the Defendants to be arbitrary, capricious and an abuse of discretion.

COUNT I - DENIAL OF PROCEDURAL DUE PROCESS

30. Plaintiffs incorporate herein the allegations contained in Paragraphs 1 through 29 of this Amended Complaint.

31. This claim arises under Article II, Sections 11 and 25 of the Colorado Constitution and under the Fourteenth Amendment of the Constitution of the United States.

32. Plaintiffs have been denied due process of law as guaranteed by Article II, Section 11 and 25 of the Colorado Constitution and by the Fourteenth Amendment to the Constitution of the United States in that the Master Plan and Conformance Plan were not heard and considered by a fair and impartial tribunal.

COUNT II - INVERSE CONDEMNATION

33. Plaintiffs incorporate herein the allegations contained in paragraphs 1 through 32 of this Amended Complaint.

34. This claim arises under Article II, Section 3, 15 and 25 of the Colorado Constitution and under the Fifth and Fourteenth Amendments to the Constitution of the United States.

35. This Court has jurisdiction of the subject matter

of this cause of action by virtue of C.R.S., 1973 Section 38-1-101 et seq.

36. The Council and the City passed the Resolution which denied Plaintiffs of the use of the RA-1 portion of Property for residential purposes.

-8-

37. The Council and the City have indicated their discriminatory and confiscatory attitude towards Plaintiffs. For example, in the Resolution, Council stated that it "deplores the height and density of the proposed project."

38. Council's denial of the use on the RA-1 portion of the Property for residential purposes was discriminatory and bears no rational or reasonable relationship to the public health, safety, morals or general welfare of the City or its residents.

39. The Council's determination that no residential units may be constructed on the RA-1 portion of the Property is confiscatory and constitutes deprivation of all reasonable use of a significant portion of the Property and precludes the use of a substantial portion of the Property for any purpose to which the property is reasonably adapted.

40. The City has a legal duty under Article II, Sections 3, 15 and 25 of the Colorado Constitution and under the Fifth and Fourteenth Amendments to the Constitution of the United States to compensate Plaintiffs for the present fair market value of that portion of the Property taken, at its highest and best use.

41. The City has failed to compensate Plaintiffs for the Property taken in an amount to be proved at trial but in excess of $45,000,000.

COUNT III - DAMAGE TO PRIVATE PROPERTY

42. Plaintiffs incorporate herein the allegations of paragraphs 1 through 32.

43. The Council's denial of Plaintiffs' right to construct residential units on the RA-1 portion of the Property, and the imposition of invalid, improper and abusive restrictions, as contained in the Resolution, have injured Plaintiffs' property interests in the Property and caused them damage, without due process of law.

44. The damage to Plaintiffs' Property as a result of the Council's and the City's actions is different in kind or degree from any damage suffered from the general public.

45. The City has a legal duty under Article II, Sections 3, 15 and 25 of the Colorado Constitution to compensate Plaintiffs for the damage to their Property.

46. The City has failed to compensate Plaintiffs for the damage to their Property in an amount to be proved at trial but in excess of $45,000,000.

COUNT IV - CIVIL RIGHTS VIOLATION

47. Plaintiffs incorporate herein the allegations contained in paragraphs 1 through 32 and 42 through 46 of this

Amended Complaint.

48. That the Defendants under color of the laws of the State of Colorado have deprived the Plaintiffs of their rights, privileges and immunities guaranteed them by the Constitution of the United States and have thereby injured the Plaintiffs in an amount to be determined at trial, but believed to be in excess of $45,000,000.

49. That the wrongful acts of these Defendants constitute not only damage to Plaintiffs' property, but an invasion, wrongful taking, and a denial of such property and the use of such property by the Plaintiffs herein resulting in damages to the Plaintiffs in an amount to be determined at trial, but believed to be in excess of $45,000,000.

WHEREFORE, Plaintiffs pray:

A. That the Court find that Plaintiffs have been denied due process of law guaranteed by Article I, Section 10 of the United States Constitution, Article II, Sections 11 and 25 of the Colorado Constitution and by the Fourteenth Amendment to the Constitution of the United States in that the Master Plan and Conformance Plan were not heard and considered by a fair and impartial tribunal.

B. That the Court find that the City's denial of the construction of residential units on the RA-1 portion of

the Property has resulted in the taking of a substantial portion of the Property for alleged public use without due process of law and that such taking has damaged Plaintiffs in an amount to be proved at trial, but presently believed to exceed $45,000,000.

-10-

C. That the Court find that the City's denial of the construction of residential units on the RA-1 portion of the Property has resulted in damage to a substantial portion of the Property for public use without die process of law and that such damage has caused a diminution in the market value of the Property in an amount to be determined at trial, but presently believed to exceed $45,000,000.

D. That the Court find that the willful acts of the Defendants herein constituted a wrongful taking of Plaintiffs' property, the destruction of or damage to Plaintiffs' property or an invasion of Plaintiffs' property resulting in damages to these Plaintiffs in an amount to be determined at trial, as well as a finding that the willful acts of the Defendants herein violated the rights of the Plaintiffs as provided for under 42 U.S.C.A. 1983, as amended, for which Defendants will be held liable in an amount to be proved at trial, for actual damages, statutory damages, and punitive damages in an amount to be determined at trial.

E. That the Court find that the wrongful acts of the Defendants herein constitute violation of the civil rights of the Plaintiffs, as found under 42 U.S.C.A. 1983, and that they be entitled to attorney's fees and punitive damages as provided under 42 U.S.C.A. 1988.

F. That the Court find that the willful and

wanton and insulting acts of these Defendants herein were acts with total disregard for the rights and feelings of the Plaintiffs herein, and for which damages should be awarded to the Plaintiffs in an amount to be determined at time of trial, but believed to be in excess of $45,000,000, and that the Court award punitive damages in an amount to be determined at trial.

G. That this Court award such other and further relief as the Court may deem just and proper, to and including interest, attorney's fees, and court costs.

Respectfully submitted,

/s/ James K. Kreutz
James K. Kreutz, #4752
James K. Kreutz & Associates, P.C.
5655 South Yosemite Street, #200
Englewood, Colorado 80111
Telephone: (303) 779-8224
ATTORNEYS FOR PLAINTIFFS

PLAINTIFFS DEMAND A JURY OF SIX

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 15th day of January, 1992, I hand-delivered a true and correct copy of the above and foregoing FIRST AMENDED COMPLAINT to:

Robert L. Morris, Esq.
P. Kathleen Lower, Esq.
Morris & Lower
7800 East Union Avenue, Suite 630
Denver, Colorado 80237-0090

/s/ Sabrina Stephens

STATE OF COLORADO
COURT OF APPEALS

2 East 14th Avenue
Denver, Colorado 80203
(303) 837-3785

MANDATE

Court of Appeals Case No. 83CA0428
Trial Court Case No. 82CV603

CHERRY HILLS RESORT DEV. CO v. CITY OF CHERRY HILLS VILLAGE

THIS CAUSE came to be heard on the record on appeal from the District Court of Arapahoe County, State of Colorado, was argued by counsel, opinion issued and judgment entered. Petition of Certiorari was applied for and granted in the Colorado Supreme Court. An opinion was announced by the Supreme Court on April 30, 1990, wherein the judgment of the Colorado Court of Appeals was REVERSED.

THEREFORE IT IS ORDERED that the judgment of the Arapahoe District Court is AFFIRMED, AND CAUSE REMANDED WITH DIRECTIONS FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE OPINION OF THE SUPREME COURT. Copies of the opinions of the Supreme Court and the Court of Appeals are attached.

WITNESS, the HONORABLE AUREL M. KELLY, Chief Judge of the Colorado Court of Appeals, and the Seal thereof affixed this 29th day of May, 1990.

COPIES MAILED TO
COUNSEL OF RECORD
Tri. Ct. Judge - Tri. Ct. Clerk
AND _____
ON 5-29-90
BY /s/ A.G.
COLORADO COURT OF APPEALS

/s/ James G. Benway
JAMES G. BENWAY
Clerk of the Court

Court of Appeals
SEAL
Colorado

COURT OF APPEALS
STATE OF COLORADO
Certified to be a full, true and correct copy
Date 5 - 29 - 90
James G. Benway
Clerk of Court of Appeals
By /s/ Allison Griffin
Deputy Clerk

SUPREME COURT, STATE OF COLORADO
Case No. 88SC502
Certiorari to the Colorado Court of Appeals 83CA0428
Arapahoe County District Court 82CV603

MANDATE

CHERRY HILLS RESORT DEVELOPMENT COMPANY,
a Colorado limited partnership, TEMPLE H. BUELL, as Trustee and Beneficiary under the Temple H. Buell Trust, and RICHARD L. NATHAN, as Trustee under the Temple H. Buell Trust,

Petitioners,

v.

THE CITY OF CHERRY HILLS VILLAGE; THE CITY OF CHERRY HILLS VILLAGE CITY COUNCIL; ROBERT ST. CLAIR, ROY A. WATTS, THEODORE B. WASHBURNE, GEORGE ANDERMAN, ANN M. POLUMBUS, DONALD J. EGAN and MERLE CHAMBERS, as present members of the City of Cherry Hills Village City Council,

Respondents.

This cause having been brought to the court on a writ of certiorari to the Colorado Court of Appeals to review the judgment of said Court of Appeals, and having been heretofore

argued by counsel and submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED and adjudged that the judgment of the court of appeals is reversed, and the case is remanded to the court of appeals with directions to return the case to the district court for further proceedings not inconsistent with the opinion of this court.

WITNESS, the HONORABLE JOSEPH R. QUINN, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City and County of Denver, this 23rd day of May, 1990.



MAC V. DANFORD
Clerk of the Supreme Court

/S/ Jaime L. Roeske
Deputy Clerk

827

CHERRY HILLS RESORT DEVELOPMENT COMPANY, a Colorado limited partnership, Temple H. Buell, as Trustee and Beneficiary under the Temple H. Buell Trust, and Richard L. Nathan, as Trustee under the Temple H. Buell Trust, Petitioners,

v.

The CITY OF CHERRY HILLS VILLAGE; the City of Cherry Hills Village City Council; Robert St. Clair, Roy A. Watts, Theodore B. Washburne, George Anderman, Ann M. Plumbus, Donald J. Egan and Merle Chambers, as present members of the City of Cherry Hills Village City Council, Respondents,

No. 88SC502

Supreme Court of Colorado
En Banc.

April 30, 1990.

Real estate developer sought judicial review of conditions imposed upon city's approval of development plan. The District Court, Arapahoe County, John P. Gately, J., reversed and modified conditions, and city appealed. The Court of Appeals, 720 P.2d 992, dismissed appeal and remanded. The Supreme Court, Quinn, C.J., 757 P.2d 622, reversed and remanded. On remand, the Court of Appeals again held for city , and developer again sought certiorari review. The Supreme Court, Rovira, J., held that municipal zoning ordinance did not preclude erection of condominiums and

apartments.

Reversed and remanded.

1. Zoning and Planning 256

Zoning ordinance, which allowed buildings to be erected for residents which were not "predominately permanent," contemplated presence of some permanent year-round residents, and thus could not be interpreted as precluding construction of condominiums and apartments as permitted uses.

2. Zoning and Planning 256

Zoning ordinance which prohibited the erection of buildings, the residents of which would have exclusive possession and control of facilities, did not preclude condominiums which, by definition, required existence of undivided interest in common elements. C.R.S. 38-33-102.

3. Zoning and Planning 382.2

It is within police power of municipality to impose on developer burden of providing reasonable improvements to public facilities made necessary by development as condition of approval of that development; exercise of such power, however, must be guided by land use regulations which are sufficiently specific to guide city council's discretion.

4. Zoning and Planning 382.2

City's land use regulation, which provided no guidance as to how any negative effects caused by development were to be alleviated, was insufficient to provide potential users of land with notice of particular standards and requirements imposed by city for development plan approval, thereby precluding municipality from requiring developer to fund certain public improvements as condition to approval plan.

5. Zoning and Planning 382.1

In absence of statute or ordinance granting authority to do so, municipality may not impose conditions upon approval of development plan; if plan meets all zoning requirements and authority to impose additional conditions or criteria to guide

828

such authority is lacking, plan must be unconditionally approved.

6. Zoning and Planning 382.1

City was not foreclosed from requiring developer to carry through with representations it made in its development plan, notwithstanding lack of independent authority in zoning code or city's master plan which would support imposition of such conditions.

7. Zoning and Planning 382.1

City could not condition approval of development plan upon requirement that developer negotiate directly with adjoining property owners; such condition unlawfully delegated city council's authority to those property owners whose property adjoined property at issue.

Holme Roberts & Owen, Lawrence L. Levin and Larry S. Schwartz, Denver, for petitioner Cherry Hills Resort Development Co.

Greengard & Senter, Richard D. Greengard, Denver, for petitioners Temple H. Buell and Richard L. Nathan.

Morris, Lower & Sattler, Robert L. Morris and P. Kathleen Lower, Denver, for respondents.

Justice ROVIRA delivered the Opinion of the Court.

Petitioners, the developers of real property in the City of Cherry Hills Village, seek review of the court of appeals determination in *Cherry Hills Resort Development Co. v. Cherry Hills Village*, No. 83CA0428 (Colo.App. Aug. 25, 1988) (not selected for publication), that (1) the zoning classification in which the property is located precludes the construction of condominiums, and (2) review of the remaining conditions imposed by the Cherry Hills City Council would be premature. We hold that the court of appeals erred in interpreting the zoning ordinance and in failing to address the additional conditions imposed on the development of the property, and accordingly, we reverse and remand with directions.

I.

This dispute involves the development of a 68.8 acre parcel of property in the City of Cherry Hills Village (City). In 1957, Temple Buell owned approximately 116 acres of land at the corner of Hampden Avenue and University Boulevard. This land was zoned R-1, a residential district with a minimum lot area of 2 acres for single family dwellings. Buell proposed to the City the construction of a "residential and resort hotel" complex which would include the development of a luxury hotel, residences, a lake, golf course, shops and other amenities. As a result, 68.8 acres of Buell's land was rezoned to RA-1, which permitted the land to be used for a "residential and resort hotel" and any other use permitted in an R-1 residential district.

The proposed complex was never constructed. In 1980, the Cherry Hills Resort Development Company (Developer) entered into an agreement with the Temple H. Buell Trust (Trust) to lease and develop the property. In July 1982, the Developer submitted two alternative development plans to the Cherry Hills Village City Council (city council). The plans were identical except that the first plan required the City to

permit a golf course on a portion of the property zoned R-1 or to rezone that area as RA-1. The second plan placed the golf course in a portion of land which was already zoned RA-1, thus requiring no further zoning action. Both plans proposed a 600 room hotel and a 200 room structure or structures committed either to condominiums or apartments.

In September 1982, the city council passed a resolution approving the second development plan, but made it approval subject to twenty restrictions and conditions. Two of these conditions completely eliminated the proposed construction of luxury condominiums or apartments. The remaining conditions placed significant limitations on the development of the proposed hotel and surrounding grounds.

In October 1982, the Developer, Buell, and the trustees for the Trust filed a complaint in the Arapahoe County District

829

Court. The complaint contained five counts: (1) a request for certiorari review, pursuant to C.R.C.P. 106(a)(4), of the conditions and restrictions imposed by the city council; (2) a procedural due process claim; (3) a request for declaratory judgment; (4) an inverse condemnation claim; and (5) a claim for damages. In September 1983, the district court dismissed counts 3, 4, and 5 of the complaint, and directed briefing only on count 1. In March 1984, the district court ruled in favor of the plaintiffs on count 1, ordering the city council to delete or modify fourteen of the conditions. The court held that by imposing these conditions, the city council exercised discretion not afforded to it under the City's zoning ordinances, thereby exceeding its jurisdiction. The court entered a final judgment pursuant to C.R.C.P. 54(b), and the City appealed.

In February 1986, the court of appeals held that the district court lacked jurisdiction to review the city council's resolution

because the council was not acting in a quasi-judicial capacity in adopting the resolution. *Cherry Hills Resort Dev. Co. v. Cherry Hills Village*, 720 P.2d 992 (Colo. App.1986). We reversed, holding that the district court had jurisdiction under C.R.C.P. 106(a)(4) to review the city council's decision. *Cherry Hills Resort Dev. Co. v. Cherry Hills Village*, 757 P.2d 622 (Colo. 1988).

On remand, the court of appeals held that the city council properly interpreted its zoning ordinances to preclude use of the subject property of condominiums. The court declined to address the remaining eighteen non-condominium conditions on the ground that it would be premature.

II

The city council imposed two conditions as part of its approval of the development plan which, in effect, prohibited the Developer from building the 200 unit residential portion of the proposed residential and resort hotel complex. Condition I states that "[t]his preliminary approval is granted with the specific understanding and condition that the City's current Zoning Code does not permit for this project condominiums, timesharing units, luxury residences, or other long-term arrangements in the sense of continuous year-round tenancy." Further, condition K mandates that "[t]he entire project shall not exceed 600 hotel units totaling a maximum 620,000 square feet."

The trial court held that these conditions conflicted both with the City's zoning regulations and the Colorado Condominium Ownership Act, §§ 38-33-101 to -112, 16A C.R.S. (1982), and thus constituted an abuse of discretion. The court of appeals reversed, holding that because condominium ownership concerns residents who are predominately permanent in the sense of continuous year-round tenancy, the condominiums were prohibited by the City's zoning regulations. Because we do not agree that the

City's zoning regulations prohibit construction of condominiums, apartments or other long term arrangements in an RA-1 zone, we reverse.

[1] Uses permitted within an RA-1 zone include "a Residential and Resort Hotel," which is defined as:

> A building, or associated group of buildings, designed for the entertainment of transients as guests for compensation, the residents of which are not predominately [sic] permanent (in the sense of continuous year-round tenancy), and do not have exclusive possession and control of the rented facilities, and the conveniences and facilities of which include, but not by way of limitation, public dining areas, meeting rooms and facilities, retail outlets, room service and housekeeping and maid services. No more that twenty five percent (25%) of the rooms available for rent shall have cooking facilities.

Cherry Hills Village, Co., City Code § 6-1-1 (1980) (Code). The City has conceded that this definition contemplates the presence of some permanent year-round residents, so long as they do not predominate. Even without this concession, it is obvious that the city council and the court of appeals erred in interpreting this zoning regulation to preclude permanent residents.

830

A statute or ordinance should be construed so as to give effect to every word, and a construction should not be adopted which renders a word superfluous. *See Colorado General Assembly v. Lamm*, 700 P.2d 508 (Colo. 1985). An interpretation of this ordinance which precludes permanent residents makes the words "predominantly" and "residential" superfluous. To prohibit permanent residents, the definition need simply have stated "the residents of which are not

permanent." The inclusion of the word "predominantly," indicates that permanent residents were contemplated, but that they could not predominate over the transient guests. Further, the term "residential and resort hotel" itself implies that something more was contemplated than a hotel for transient guests.

The City suggests that the long-term residences contemplated by the ordinance must be rooms or suites in the hotel, rather than the separate "luxury residences" proposed by the Developer. It argues that the language "no more than twenty five (25%) of the rooms available for rent shall have cooking facilities" manifests an intent to restrict the long-term units to hotel rooms with kitchen facilities.

First, nothing in the quoted sentence precludes the development of separate apartments or condominiums. Moreover, the zoning history of this tract of land indicates that the city council's predecessor, the Board of Trustees, intended to allow the development of separate year-round residences when it created the RA-1 zone. When the original "residential and resort hotel" "complex was proposed in 1957, the plans included apartments as part of the complex. Finally, the minutes of the January 20, 1958 meeting of the Board of Trustees state that "[t]he Trustees asked to have hotel, apartment and apartment hotel included in the definitions in the proposed ordinance." Although these terms were not included in the definition, this suggests that the term "residential and resort hotel" was intended to include apartments as a permissible use.

The City next argues that the "luxury residences" portion of the development plan was properly rejected because the permanent residences predominated over the hotel portion of the plan. The plan provided for residences ranging in size from 2000 to 5000 square feet, as compared to the hotel rooms, which would measure 450 square feet each. However,

the predominance requirement in the ordinance clearly speaks to the number of residents, rather than to the area of the various units. The record contains no evidence which would indicate that the 200 proposed permanent residences would house more residents than the 600 proposed hotel rooms. Absent such evidence, there is no support for the contention that the residential portion of the development plan would predominate over the hotel portion of the plan.

[2] Finally, the City argues that even if permanent residences are permitted, condominiums are impermissible under § 6-1-1 because the residents of condominiums have "exclusive possession and control of the rented facilities." In support, the City cites the provisions of the Colorado Condominium Ownership Act to show that exclusive possession and control of the air space is a dominant feature of condominium ownership. However, the very definition of a condominium requires the existence of an undivided interest in common elements. § 38-83-102, 16A C.R.S. (1982). Thus, a condominium owner cannot have exclusive possession and control of the facilities.

III

In addition to the two conditions discussed in Part II, the city council imposed eighteen other conditions and restrictions which placed significant restraints on the Developer. Of these eighteen conditions, the trial court found nine totally invalid, and one partially invalid, and ordered the city council to delete them from the resolution approving the second development plan. The court of appeals declined to review the propriety of these conditions because it would be premature. The developer argues that the court of appeals erred in refusing to review the

remaining conditions. We agree.

831

The court of appeals determined that because the proposed condominium development was not a permitted use in an RA-1 district, there was no need to address the remaining conditions "as there was [sic] ample grounds for the City to reject Developer's proposal." It is clear from this statement that the court of appeals misapprehended the posture of this case. The city council did not reject the Developer's proposal. Rather, it approved the project, but attached the disputed conditions to its approval. Because the court of appeals reversed the trial court's invalidation, in whole or in part, of twelve of the conditions, the Developer may now proceed with the project only if it complies with all of the city council's conditions. Thus, we agree that the propriety of the imposed conditions should have been addressed on appeal.

This litigation began in 1982. Since then, it has twice been before the court of appeals and it is now before us for the second time. The propriety of the imposed conditions has been fully briefed and argued by both parties in this court.

1. In its opening brief, the Developer fully argued the propriety of the imposed condition. In its answer, the City stated that in the interest of judicial economy, it would respond to the Developer's arguments on the merits so as to allow resolution of the issue of the conditions. Further, in oral argument, both parties argued the merits of the imposed conditions, and the City indicated that it was willing to argue the merits of the issue because, after seven years of litigation, it would like to see the case concluded. Therefore, it appears that neither party will be prejudiced by our decision to review the propriety of the conditions.

Therefore, in the interest of judicial economy, we choose to review the trial court's invalidation of the city council's conditions ourselves rather than remand the cause to the court of appeals for further proceedings.[1]

The Developer contends that the trial court properly invalidated ten of the imposed conditions on the grounds that the city council exceeded its jurisdiction and abused its discretion. We agree.

[3] Cherry Hills Village, Co., City Code § 6-11-4 (1980), states that:

> No building permit shall be issued for any construction within an RA-1 Resort Area District until complete plans are approved (which approval shall not be unreasonably withheld) by the City Council, with the advice of the Planning and Zoning Commission, after consideration of the compatibility of the proposed plans with the City's Master Plan, this Title, and existing structures and uses in the neighboring area.

In reviewing the Developer's plan, the city council imposed the following conditions and restrictions which were subsequently invalidated by the trial court:

A. The building heights shall not exceed those represented to the City by the Developer, i.e., chimney--90 feet, highest roof line--80 feet; restaurant--70 feet.

B. Recreational facilities shall include not less than nine tennis courts, one swimming pool, one outdoor skating

rink, health club, and nine-hole executive type golf course.

C. Parking facilities shall include underground parking for at least 1,150 vehicles, and surface parking for not more than 370 vehicles.

E. To assist in alleviating traffic congestion, improvements acceptable to the City and the State Highway Department shall be provided at the intersection of South University Boulevard and East Hampden Avenue, with the Developer providing the funding therefor in the amount of not less than Five Hundred Thousand Dollars ($500,000) as represented by the Developer.

F. The nine-hole golf course shall as proposed be provided generally at the northwest area of the project.

H. Sound and view impacts upon adjacent residential properties shall be mitigated by the use of landscaping, berming and other acceptable devices. It is required that the Developer negotiate directly with each individual adjoining property owner to arrive at the most suitable and acceptable plan to minimize to the extent reasonably possible adverse sound and view impacts resulting from the project.

832

L. Developer shall submit to the City satisfactory evidence of its financial ability to perform and complete the entire project.

M. As claimed by the Developer the proposed resort hotel

shall be of highest quality comparable to the Mobil Five-Star designation.

N. Retail outlets shall be of the highest quality appropriate to the Mobil Five-Star designation.

R. Developer shall provide all funds required for additional fire equipment necessitated as a result of the project, as may be reasonably determined by the Cherry Hills Fire Protection District.[2]

Conditions E and R require the Developer to fund certain public improvements as a condition to approval of the plan. It is within the police power of a municipality to impose on a developer the burden of providing reasonable improvements to public facilities made necessary by a development as a condition of approval of that development. *Beaver Meadows v. Board of County Comm'rs,* 709 P.2d 928 (Colo.1985); *Bethlehem Evangelical Lutheran Church v. City of Lakewood,* 626 P.2d 688 (Colo. 1981). The exercise of such power, however, must be guided by land use regulations which are sufficiently specific to guide the city council's discretion. *Id.*

For example, in *Bethlehem Evangelical Lutheran Church v. City of Lakewood,* 626 P.2d 668 (Colo.1981), we upheld the City of Lakewood's action in conditioning a building permit on the construction of certain public on the construction

2. The trial court also construed Condition O, which stated [a]ll capital or public improvements, including within limitation traffic signals and devices, shall be at the sole expense of the Developer, to apply only to those improvements constructed within the 68.8 acre project. Because the City did not specifically claim error on appeal or on certiorari review, and because the Developer made no objection, we do not address the propriety of the trial court's action.

of certain public improvements. The city had an ordinance which expressly allowed such a condition upon a finding that the improvements were necessitated by the proposed construction, and were related to the public safety of the user of the sidewalks and streets. Further, the ordinance required that the improvements meet certain legislatively adopted specifications, thus circumscribing Lakewood's discretion as to the nature and extent of the improvements that could be required.

[4] Here, although the zoning regulations and the master plan evidence an intent that the city council consider the effect of development on traffic congestion and fire protection, the regulations provide no guidance as to how any negative effects caused by the development must be alleviated. Absent such guidelines, the City's land use regulation is insufficient to provide "all users and potential users of land with notice of the particular standards and requirements imposed by the [City] for [development plan] approval." Beaver Meadows, 709 P.2d at 936. Further, there are not sufficient standards to "ensure that any action taken by a [city] in response to a land use proposal will be rational and consistent and that judicial review of that action will be available and effective." *Id.* at 936. Consequently, the trial court correctly deleted conditions E and R from the city council's resolution.[3]

3. In its brief, the City concedes that the city council exceeded its authority in imposing condition E, but maintains that a letter from Buell in 1958 supports the imposition of condition R. However, because the Code did not contain sufficient criteria, and because the Developer did not agree to take on this responsibility in its development plan, we find that condition R was improper.

[5] In the absence of a statute or ordinance granting authority to do so, a municipality may not impose conditions upon the approval of a development plan. *Beaver Meadows v. Board of County Comm'rs* 709 P.2d 928 (Colo.1985). If a plan meets all of the zoning requirements and authority to impose additional conditions or criteria to guide such authority is lacking, the plan must be unconditionally approved. *Sherman v. Colorado Springs Planning Comm'n,* 763 P.2d 292 (Colo.1988); *Bauer v. City of Wheat Ridge,* 182 Colo. 324, 513 P.2d 203 (1973); *Western Paving Constr.*

833

Co. v. Board of County Comm'rs, 181 Colo. 77, 506 P.2d 1230 (1973).

[6] Conditions A, B, F, M, and N simply require the Developer to carry through with the representations it made in its development plan. Although we agree with the trial court that there is no independent authority on the zoning code or the City's master plan which would support the imposition of these conditions, we hold that the City was not foreslosed from adopting the conditions because the Developer had included them within its plan.[4]

4. The city council also required [full and complete compliance by the Developer with all representations, assurances, and proposals set forth in the [development plan] submitted to the City except for those inconsistent with this Resolution in Condition J. The trial court found that this requirement was a valid condition under Ordinance No. 2, Series of 1970. Because the trial court's approval of this condition was not appealed, the Developer is still bound to comply with its representations in the development plan.

Condition C addresses the parking facilities required by the City. The trial court held that the condition was more restrictive than was required by the Code, and thus the condition was arbitrary. Cherry Hills Village, Co., City Code § 6-15-1 (1980), sets out the City's required parking facilities for new developments. The Code requires off-street parking for each use conducted on the land, according to a specific formula included in the ordinance. Applying these criteria to the specifications provided by the Developer in the development plan, the Code requires that 1,374 parking spaces by constructed.[5] The city council has only required the Developer to provide 1,150 parking spaces, which are to be underground. Although surface parking was limited to an additional 370 spaces, the Developer was not required to create such spaces. Therefore, the city council's condition was proper in terms of the number of parking spaces.

Again, although the City cannot impose the requirement that 1,150 of the parking spaces be underground because

5. The Code requires one parking space for each unit of a dwelling or resort hotel, thus requiring 800 parking spaces for this project. Further, one parking space is required for every four seats in an eating or drinking facility. The project's eating and drinking facilities are comprised of 875 seats, which mandates an additional 218 parking spaces. The Code also requires one parking space per 100 square feet of meeting space in an auditorium of other place of assembly. Because the proposed hotel includes 30,000 square feet of meeting space, another 300 parking spaces are necessary. Finally, one parking space is required for every 200 square feet of retail space. The proposed project has 11,200 square feet of such space, requiring 56 parking spaces. Thus, according to the specifications of the development plan, 1,374 parking spaces are necessary to comply with the Code.

nothing in the Code or the master plan authorizes such a condition, the City may impose such a requirement because of the Developer's plan.[6]

[7] The trial court found that the first sentence of condition H was appropriate, but that the requirement that the Developer negotiate directly with adjoining property owners constituted an abuse of discretion. The City has conceded that this part of condition H is invalid. We agree that the second sentence of the condition unlawfully delegates the city council's authority to those property owners whose property adjoins the property at issue in this case, and is therefore invalid. *Frankel v. City & County of Denver*, 147 Colo. 373, 363 P.2d 1063 (1961).

Finally, neither the Code not the master plan provided the city council with authority to impose condition L, which requires the Developer to submit evidence of its ability to complete the entire project. The City has conceded that this condition should not have been imposed. Therefore, the trial court correctly found that the condition was arbitrary and an abuse of discretion.

Accordingly, the judgment of the court of appeals is reversed, and the case is remanded to the court of appeals with directions to return the case to the district

834

court for further proceedings not inconsistent with this opinion.

6. In the development plan, the Developer indicated that 1,150 parking spaces would be underground. Thus, the Developer is still bound by this representation pursuant to condition J. *See supra* note 4.

COLORADO COURT OF APPEALS
No. 83CA0428

CHERRY HILLS RESORT DEVELOPMENT COMPANY, a Colorado limited partnership; TEMPLE H. BUELL, as Trustee and beneficiary under the Temple H. Buell Trust, and RICHARD L. NATHAN, as Trustee under the Temple H. Buell Trust,

Plaintiffs-Appellees,

NOT SELECTED FOR PUBLICATION

v.

THE CITY OF CHERRY HILLS VILLAGE; THE CITY OF CHERRY HILLS VILLAGE CITY COUNCIL; ROBERT ST. CLAIR, ROY A. WATTS, THEODORE B. WASHBURNE, GEORGE ANDERMAN, ANN M. POLUMBUS, DONALD J. EGAN and MERLE CHAMBERS, as present members of the City of Cherry Hills Village City Council,

Defendants-Appellants,

and

GARY A. AGRON and THOMAS J. HILB,

Intervenors-Defendants-Appellants.

COURT OF APPEALS
STATE OF COLORADO
Opinion filed and judgment entered on the 25th day of August, 1988.
Clerk of the Court
Court of Appeals SEAL Colorado
/S/

Appeal from the District Court of Arapahoe County
No. A82CV603

Honorable John P. Gately, Judge

DIVISION I
Opinion by JUDGE PIERCE
Kelly, C.J. and Babcock, J., concur

JUDGMENT REVERSED
AND CAUSE REMANDED
WITH DIRECTIONS

8/29/88

Holme, Roberts & Owen
G. Kevin Conwick
Lawrence L. Levin
Larry S. Schwartz
Amelie A. Buchanan
Pamela J. Strauss
Leslie M. Reed
Englewood, Colorado

Attorneys for Plaintiff-Appellee Cherry Hills Resort Development Company

Davis, Graham & Stubbs (on the briefs)
Robert L. Morris
Denver, Colorado

Attorneys for Defendants-Appellants

Morris & Lower
Robert L. Morris
P. Kathleen Lower
Denver, Colorado

Attorneys for Defendants-Appellants

Arnold & Porter (on the briefs)
Andre M. Reiman
Mark H. Boscoe
Denver, Colorado

Attorneys for Intervenors-Defendants-Appellants

Defendants, City of Cherry Hills Village (City) and its city council, appeal the trial court judgment which invalidated the imposition of certain restrictions placed upon the development proposal submitted for preliminary approval by plaintiff Cherry Hills Resort Development Company (Developer). We reverse.

In Cherry Hills Resort Development Co. v. City of Cherry Hills Village, 720 P.2d 992 (Colo. App. 1986), we determined that the trial court was without jurisdiction to review the city's actions in this case. However, in Cherry Hills Resort Development Co. v. Cherry Hills Village, _ P.2d _ (Colo. No. 86SC156, June 6, 1988), our supreme court reversed that decision and reminded the case to this court for a decision on the merits. Accordingly, on the basis of the facts as set forth in the two prior opinions, we proceed to the merits of this appeal.

The primary focus of this appeal concerns the City's conclusion that Developer's proposed construction of 200 condominium units in conjunction with a residential and resort hotel was not permitted within an RA-1 zoned district. The district court determined that the proposed development of the condominium units was permissible and, therefore, declared the City's actions to be an abuse of discretion.

I.

City contends that the district court erred in concluding that the condominium phase of the project was a permitted use within an RA-1 zone. We agree.

-1-

City of Cherry Hills Village Zoning Regulations (Zoning Regulations) § 6-11-1 (1982) authorizes two permitted uses within an RA-1 zone: (A) a residential and resort hotel and (B) any use permitted in an R-1 2 1/2 acre residential district. Therefore, we must determine whether the condominium portion of the proposed development falls within one of the permitted uses in an RA-1 district.

A.

The Zoning Regulations § 6-1-1 defines a residential and resort hotel as:

> " A building, or associated group of buildings, designed for the entertainment of transients as guests for compensation, the residents of which are not predominately permanent (in the sense of continuous year-round tenancy), and do not have exclusive possession and control of the rented facilities...."

We reject Developer's argument that the term "predominantly permanent," for purposes of this action, means only that the number of permanent residents must not predominate over the number of non-permanent residents; and therefore, because only 200 of the 800 units are permanent, they do not predominate. The language of this section refers to the nature and type of tenancy rather than the actual quantity of residents. Because the 200 units were designated for condominium ownership, the residents of which are predominantly permanent in the sense of continuous year-round tenancy, the City did not abuse its discretion in determining that the condominium phase of the proposed development project was not a permitted use.

We also reject plaintiff's assertion that the condominiums may be considered a permissible accessory use under the Zoning Regulations § 6-11-2(B). The proposed portion of the development cannot be characterized as a structure clearly and customarily incidental and subordinate to the principal structure. See Board of County Commissioners of County of Boulder v. Thompson, 177 Colo. 277, 493 P.2d 1358 (1972); Section 6-1-1 of the Zoning Regulations.

B.

Among the various permitted uses within a district zoned R-1 2 1/2 acre residential, the only arguably applicable use is for a single family dwelling.

Section 6-1-1 of the Zoning Regulations defines a single family dwelling as: "a detached residential dwelling unit. . . designed for and occupied by one family only."" Section 6-5-2(B) of the Zoning Regulations further requires that the minimum lot area for each dwelling be two and one-half acres of land.

The condominium phase of the developer's plan proposed the construction of 200 units located on approximately three acres of land. Therefore, the City correctly concluded that the proposed development was neither a permitted use in an R-1 2 1/2 acre residential district, nor was it a permitted use in an RA-1 district.

II.

In light of our disposition, we need not address the propriety of the remaining conditions as there was ample grounds for the City to reject Developer's proposal. To the extent any inappropriate conditions may be imposed in the future, those conditions are reviewable upon the submission by the developer of a proposal which conforms with the

existing zoning regulations.

III.

We find no merit to intervenor-defendants' contention that the trial court erred in failing to allow them to intervene. Any interest they may have had in this litigation was represented adequately by the City. See C.R.C.P. 24(a); Denver Chapter Colorado Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Accordingly, the judgment of the district court is reversed and the cause is remanded to the district with direction to further remand to the city with directions to afford Developer an opportunity to submit a proposal which conforms with existing zoning regulations.

CHIEF JUDGE KELLY and JUDGE BABCOCK concur.

622

CHERRY HILLS RESORT DEVELOPMENT COMPANY, A Colorado limited partnership, Temple H. Buell, as Trustee and Beneficiary under the Temple H. Buell Trust, and Richard L. Nathan, as Trustee under the Temple H. Buell Trust, Petitioners,

v.

The CITY OF CHERRY HILLS VILLAGE; the City of Cherry Hills Village City Council; Robert St. Clair, Roy A. Watts, Theodore B. Washburne, George Anderman, Ann M. Polumbus, Donald J. Egan and Merle Chambers, as present members of the City of Cherry Hills Village City Council, Respondents,

and

Gary A. Agron and Thomas J. Hilb,
Intervenors-Respondents.

No. 86SC156.

Supreme Court of Colorado,
En Banc.

June 6, 1988.

Village granted preliminary approval of developer's plan for development of resort hotel, but specified certain conditions, and developer sought judicial review. The District Court, Arapahoe County, John P. Gately, J., reversed and

modified conditions, and village appealed. The Court of Appeals, 720 P.2d 992, dismissed appeal and remanded. On grant of certiorari, the Supreme Court, Quinn, C.J., held that city exercised quasi-judicial function in approving development plan while imposing several restrictions thereon so that city's actions satisfied jurisdictional prerequisite for judicial review.

Judgment of Court of Appeals reversed and case remanded.

1. Municipal Corporations 92

Exercise of quasi-judicial authority by legislative body, unlike legislative authority, is conditioned upon observance of traditional procedural safeguards against arbitrary governmental action.

2. Municipal Corporations 92

If statute or ordinance authorizes exercise of quasi-judicial authority but does not provide for notice and hearing, these basic requirements may properly be implied as matter of fundamental fairness to those persons whose protected interests are likely to be affected by governmental decision.

3. Municipal Corporations 104

Element of quasi-judicial action on part of legislative body for purposes of judicial review, that state or local law require governmental body give adequate notice before acting on matter, does not require preexisting ordinance or statute mandating notice on public hearing; rather, existence of statute or ordinance mandating these requirements is compelling proof that any decision under legislative scheme is intended to be quasi-judicial for review purposes. Rules Civ.Proc., Rule 106(a)(4).

4. Municipal Corporations 104

It is nature of decision rendered by governmental body, and not existence of legislative scheme mandating notice and hearing, that is predominant consideration in determining whether governmental body has exercised quasi-judicial function in rendering its decision so as to render decision subject to judicial review. Rules Civ.Proc., Rule 106(a)(4).

5. Municipal Corporations 92

In absence of legislatively prescribed notice and hearing requirements, it is incumbent upon governmental body to provide adequate notice and opportunity to be heard to those persons whose protected interests are likely to be affected by governmental decision.

6. Zoning and Planning 570

City exercised quasi-judicial function in approving development plan while imposing several restrictions thereon so that city's actions satisfied jurisdictional prerequisite for judicial review, where resolution affected developer's property interest resolution pertained only to use of particular site in question, and city provided adequate notice

623

and public hearing on proposed development plan. Rules Civ.Proc., Rule 106(a)(4).

Holme Roberts & Owen, Lawrence L. Levin, Pamela J. Strauss, Englewood, for petitioner, Cherry Hills Resort Development Co.

Greengard, Blackman & Senter, Richard D. Greengard, Denver, for petitioners, Temple H. Buell and Richard L. Nathan.

Morris & Lower, Robert L. Morris, P. Kathleen Lower, Denver, for respondents.

QUINN, Chief Justice.

We granted certiorari to review the decision of the court of appeals in *Cherry Hills Resort Development Co. v. City of Cherry Hills Village*, 720 P.2d 992 (Colo.App.1986), dismissing an appeal by the City of Cherry Hills Village and its City Council to review a judgement entered in a C.R.C.P. 106 (a)(4) proceeding and remanding the case to the district court with directions to dismiss the complaint. The court of appeals held that the district court lacked jurisdiction to review the City Council's resolution approving but also imposing various restrictions on Cherry Hills Resort Development Company's development plan for a residential and resort hotel complex in the City of Cherry Hills Village because, in the court of appeals' view, the City Council was not acting in a quasi-judicial capacity in adopting the resolution. We conclude that the City Council exercised a quasi-judicial function in adopting the resolution and that, therefore, the district court had jurisdiction under C.R.C.P. 106(a)(4) to review the City Council's decision. We accordingly reverse the judgement and remand the case to the court of appeals for further proceedings on the merits of the appeal.

I.

In October 1980 Temple H. Buell and Richard L. Nathan, as trustees of the Temple H. Buell Trust, leased 68.8 acres of land in the City of Cherry Hills Village to Cherry Hills Resort Development Company, which intended to develop a residential and resort hotel complex on the land. The land is zoned RA-1 Resort Area District, the only land in the city so

designated. Under section 6-11-1 of the City Code of Cherry Hills Village, a permitted use in an RA-1 zoned area is a residential and resort hotel.[1] Section 6-11-4 of the City Code requires the City Council's approval of a development plan in an RA-1 zoned area by providing as follows:

> No building permit shall be issued for any construction within an RA-1 Resort Area District until complete plans are approved (which approval shall not be unreasonably withheld) by the City Council, with the advice of the Planning and Zoning Commission, after consideration of the compatibility of the proposed plans with the City's Master Plan, this Title, a traffic impact study, and existing structures and uses in the neighboring area. These plans must include the location, height and area of all proposed structures, outdoor signs and lighting, as well as the location and details of recreational areas and all accessory structures and roadways.

City of Cherry Hills Village, Colo., City Code, § 6-11-4 (1970).

On August 3, 1982, Cherry Hills Resort Development

1. Section 6-1-1 of the City Code of Cherry Hills Village defines a "residential and resort hotel" as follows:

> A building, or associated group of buildings, designed for the entertainment of transients as guests for compensation, the residents of which are not predominantly permanent (in the sense of continuous year-round tenancy), and do not have exclusive possession and control of the rented facilities, and the conveniences and facilities of which include, but not by way of limitation, public dining areas, meeting rooms and facilities, retail outlets, room service and housekeeping and maid service. No more than twenty five percent (25%) of the rooms available for rent shall have cooking facilities.

Section 6-11-1 B of the City Code also provides that any use permitted in an R-1 two and one-half acre residential district is also a permissible use in an RA-1 zone.

Company submitted to the City Council a request for approval of a plan that called for the construction of 600 hotel units and 200 residential units on the RA-1 zoned land. The proposed develop-

624

ment plan generated a great deal of community interest. The Planning and Zoning Commission and the City Council held numerous meetings with Cherry Hills Resort Development Company and also, although not required to do so by statute or ordinance, gave notice to the developer and to the public and conducted several hearings to allow both the developer and other interested persons to present their views on the plan. On September 21, 1982, the City Council adopted a resolution approving the general concept of the proposed residential and resort hotel complex but imposing twenty restrictions on the development plan.

On October 20, 1982, Buell, Nathan, and Cherry Hills Resort Development Company (hereinafter collectively referred to as "developer") filed a complaint in the district court seeking judicial review under C.R.C.P. 106(a)(4) of the resolution. The district court concluded that the City Council had abused its discretion in imposing twelve of the restrictions on the development plan as either contrary to or unsupported

2. The twelve restrictions invalidated by the district court included various building heights, the content of recreational facilities, the type and location of parking facilities, a requirement that the developer provide $500,000 in funding for improvements on the state highways adjoining the development site, the location of a nine-hole golf course at the site, a requirement that the developer negotiate with the adjoining property owners to arrive at a suitable plan for minimizing adverse sound and view effects from the project, the prohibition of condominiums or other forms of year-round tenancy, the requirement that the resort hotel and retail at the site be of the highest quality comparable to the mobile five-star hotel designation, and the requirement that the developer provide all funds necessary for additional fire equipment as the result of the project.

by the zoning requirements of the City Code, contrary to a controlling state statute, or an invalid imposition on the developer of a duty that was the exclusive responsibility of the City Council.[2] The court accordingly remanded the case to the City Council with directions to delete the twelve restrictions from the resolution.

The City of Cherry Hills Village and its City Council (hereinafter collectively referred to as "the city") appealed from the judgment to the court of appeals, claiming that the district court had erred in concluding that the city had abused its discretion. The court of appeals, on its own motion, issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction. After submission of briefs, the court of appeals dismissed the appeal and remanded the case to the district court with directions to dismiss the developer's C.R.C.P. 106(a)(4) complaint. Drawing on this court's decision in *Snyder v. City of Lakewood,* 189 Colo. 421, 542 P.2d 371 (1975), the court of appeals stated:

> The three factors which must exist in order to find that an inferior tribunal has acted in a judicial or quasi-judicial capacity are:
>
> "1) A state or local law requiring that the body give adequate notice to the community before acting; 2) a state or local law requiring that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and 3) a state or local law requiring the body to make a determination by applying the facts of a specific case to certain criteria established by law."

Cherry Hills Resort, 720 P.2d at 993 (quoting *Snyder,* 189 Colo. at 425, 542 P.2d at 374). After concluding that the last *Snyder* factor had been satisfied in this case, the court of appeals held that although the city had given notice of and had conducted public hearings prior to the adoption of the

resolution, "such notice and hearing were not required by state or local law." *Id.* at 993-94. In the court of appeals' view, therefore, the first two *Snyder* criteria for quasi-judicial action were not established, with the result that the district court lacked jurisdiction under C.R.C.P. 106(a)(4) to review the city's resolution.

We granted certiorari to consider whether the city's resolution approving but also imposing various restrictions on the development plan constituted quasi-judicial action for the purpose of a judicial review

625

proceeding initiated in the district court pursuant to C.R.C.P. 106(a)(4).[3]

II.

In urging reversal of the judgment of dismissal, the developer argues that the court of appeals applied an excessively restricted standard in concluding that the city's resolution did not qualify as quasi-judicial action for the purpose of a C.R.C.P. 106(a)(4) proceeding in the district court. At all times during the pendency of the proceedings in the district court, C.R.C.P. 106(a)(4) provided in pertinent part as follows:

> In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in these rules:
>
> . . . . .

3. During oral argument the city argued that because the resolution did not constitute final governmental action, it was not subject to C.R.C.P. 106(a)(4) review. This issue of finality was not raised before the court of appeals, and we did not include it in the writ of certiorari. We therefore assume the existence of final governmental action for purposes of C.R.C.P. 106(a)(4), and we do not address the issue further in this opinion.

> 4) Where an inferior tribunal (whether court, board, commission or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy, and adequate remedy....Review shall not be extended further than to determine whether the inferior tribunal has exceeded its jurisdiction or abused its discretion.

Before resolving the merits of the developer's claim, it is necessary to consider the nature of quasi-judicial action and to delineate, to the extent practicable, the essential characteristics of this type of governmental decision-making.

A.

[1] Municipal governing bodies, such as a city council, not only perform legislative functions but also engage in activities of a quasi-judicial nature. It is important to distinguish a legislative from a quasi-judicial function because the exercise of quasi-judicial authority, unlike legislative authority, is conditioned upon the observance of traditional procedural safeguards against arbitrary governmental action. These safeguards basically consist of providing adequate notice to those individuals whose protected interests are likely to be adversely affected by the governmental action, and giving to such persons a fair opportunity to be heard prior to the governmental decision. *Mountain States Telephone and Telegraph Co. v. Department of Labor,* 184 Colo. 334, 338, 520 P.2d 586, 588 (1974); *Schoenberg Farms, Inc. v. People,* 166 Colo. 199, 209, 444 P.2d 277, 282 (1968); *South View Cemetery Association v. Hailey,* 199 Ga. 478, 34 S.E.2d 863, 866 (1945); *Buechele v. Ray,* 219 N.W.2d 679, 681 (Iowa 1974); *City of Albany v. McMorran,* 34 Misc.2d 316, 230 N.Y.S.2d 434, 436-37 (N.Y.Sup.Ct.1962).

[2] Legislative action is usually reflective of some public policy relating to matters of a permanent or general character,

is not normally restricted to identifiable persons or groups, and is usually prospective in nature. *Witcher v. Canon City,* 716 P.2d 445, 449-50 (Colo. 1986); *Margolis v. District Court,* 638 P.2d 297, 303 (Colo. 1981); *City of Aurora v. Zwerdlinger,* 194 Colo. 192, 196-97, 571 P.2d 1074, 1077 (1977); *see Developments in the Law-Zoning,* 91 Harv. L. Rev. 1427, 1510-11 (1978). Quasi-judicial action, on the other hand, generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interests in question. *City and County of Denver v. Eggert,* 647 P.2d 216, 222 (Colo. 1982); *Schoenberg Farms,* 166 Colo. at 209, 444 P.2d at 282; *Board of Supervisors v. Department of Revenue,* 263 N.W. 2d 227, 239 (Iowa 1978); *Appalachian Power Co. v. Public Service Commission,* 162 W. Va. 839, 253 S.E.2d 377, 383-85 (1979); *see* 91 Harv. L. Rev. at 1510-12. This type of decision-making is denom-

626

inated "quasi-judicial" precisely because it bears similarities to the adjudicatory function performed by courts. *Handlon v. Town of Belleville,* 4 N.J. 99, 71 A.2d 624, 626 (1950). If a statute or ordinance authorizes the exercise of quasi-judicial authority but does not provide for notice and hearing, these basic requirements may properly be implied as a matter of fundamental fairness to those persons whose protected interests are likely to be affected by the governmental decision. *Juzek v. Hackensack Water Co.,* 48 N.J. 302, 225 A.2d 335, 342 (1966).

B.

[3] In both *Snyder,* 189 Colo. 421, 542 P.2d 371, and

Eggert, 647 P.2d 216, this court addressed in some detail the nature of quasi-judicial action and the significance of that characterization for purposes of judicial review under C.R.C.P. 106(a)(4). In *Snyder*, homeowners and residents within a three-block area challenged a Lakewood rezoning ordinance by instituting a proceeding under C.R.C.P. 106(a)(4). The ordinance rezoned church property from "residential-one" to "restricted commercial." The district court dismissed the C.R.C.P. 106 (a)(4) claim as untimely filed, and this court, in the process of approving that aspect of the district court's ruling, outlined the three factors of quasi-judicial action on which the court of appeals relied in resolving the instant case, namely: (1) a state or local law requiring that the governmental body give adequate notice before acting on the matter; (2) a state or local law requiring the governmental body to conduct a public hearing, pursuant to notice, at which concerned citizens may be heard and present evidence; and (3) a state or local law requiring the governmental body to make a determination based upon an application of legal criteria to the particular facts before it. 189 Colo. at 425, 542 P.2d at 374.

Our decision in *Snyder* proceeded from a recognition that the essence of quasi-judicial action lies not so much in the specific characteristics of the decision-making body as in the nature of the decision itself and the process by which that decision is reached. Although one could possibly read *Snyder* to mean that a preexisting ordinance or statute mandating notice and a public hearing is an indispensable component of quasi-judicial action for the purpose of a C.R.C.P. 106(a)(4) proceeding, we decline to so interpret that case. Such a reading of *Snyder* would lead to the anomaly that a municipal body, after providing notice and a hearing to persons whose property interests will likely be affected by the decision, could conduct a hearing that has all the characteristics of an adjudicatory proceeding, and then render a decision that

would be insulated from judicial review under C.R.C.P. 106 (a)(4) simply because there was no preexisting legislative mandate for notice and a public hearing with respect to the matter in question. Such a restrictive reading of *Snyder* would virtually eliminate any opportunity for meaningful judicial review of many types of governmental decision-making that in all other respects manifest all the characteristics of quasi-judicial action.

Indeed, *Snyder* emphasized that the state zoning statutes expressly authorized the City of Lakewood to amend its general zoning ordinance after notice and a public hearing and that these same statutes outlined the specific criteria for zoning decisions. 189 Colo. at 425-26, 542 P.2d at 374-75. The significance of the notice and hearing requirements listed in *Snyder*, therefore, lies not in the fact that there must be a statute or ordinance mandating these requirements before quasi-judicial action can occur, but rather in the fact that the existence of a statute or ordinance mandating these requirements is compelling proof that any decision under that legislative scheme is intended to be quasi-judicial in character and thus subject to judicial review under C.R.C.P. 106 (a)(4).

Seven years after *Snyder*, we again considered the nature of quasi-judicial action in *Eggert*, 647 P.2d 216. In that case, the County Commissioners of Arapaho County concluded that the City and County of Denver, which operated a sanitary landfill under a certificate of designation issued pursuant to the Solid Wastes Act, §§ 30-

627

20-101 to-118, 12A C.R.S. (1986), had expanded its operation beyond the intent and purposes of the certificate by permitting various types of hazardous wastes to be deposited at the landfill. The county commissioners adopted a resolution ordering Denver to cease and desist from the placement and

storage of hazardous wastes at the landfill. Denver thereupon initiated a C.R.C.P. 106(a)(4) proceeding challenging the validity of the resolution. The district court determined that because no state or local law required the commissioners to give notice of or to conduct a public hearing before issuing the resolution, the resolution was quasi-legislative in nature and not subject to judicial review under C.R.C.P. 106(a)(4).

[4] In reversing the judgement of the district court, we emphasized that the Solid Wastes Act, although not requiring the county commissioners to provide notice and a hearing before issuing a cease and desist order, did authorize the commissioners to revoke or suspend Denver's certificate of destination and expressly required notice and a public hearing prior to the imposition of such sanction. 647 P.2d at 222. We then concluded that the resolution in question was not a generalized conclusion of future applicability, but rather pertained to the immediate parties to the landfill operation and thus was quasi-judicial in nature and within the ambit of C.R.C.P. 106(a)(4) review *Id.* at 222-23. Since the county commissioners had not provided Denver with adequate notice of the purpose of the hearing at which the resolution was adopted, we reversed the judgment of the district court and remanded the case with directions to dismiss the C.R.C.P. 106(a)(4) complaint. *Eggert* thus clearly stands for the proposition that it is the nature of the decision rendered by the governmental body, and not the existence of a legislative scheme mandating notice and a hearing, that is the predominant consideration in determining whether the governmental body has exercised a quasi-judicial function in rendering its decision.

C.

While we acknowledge that there is no litmus-like test for identifying quasi-judicial action, we are nonetheless satisfied that the essential characteristics of quasi-judicial action are

sufficiently distinct to provide a workable basis for determining whether the jurisdictional prerequisites for judicial review under C.R.C.P. 106(a)(4) have been satisfied. The central focus, in our view, should be on the nature of the governmental decision and the process by which that decision is reached. If, for example, the governmental decision is likely to adversely affect the protected interests of specific individuals, and if a decision is to be reached through the application of preexisting legal standards or policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty the governmental body is acting in a quasi-judicial capacity in making its determination. *See, e.g., Cunningham v. Department of Civil Service*, 69 N.J. 13, 350 A.2d 58, 62-63 (1975); *Handlon v. Town of Belleville*, 71 A.2d at 626; *Orange County Publications Division of Ottaway Newspapers, Inc. v. Council of City of Newburgh*, 89 Misc.2d 847, 393 N.Y.S.2d 298, 302 (Sup.Ct.1977), *aff'd*, 60 A.D.2d 409, 401 N.Y.S.2d 84, *aff'd*, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S. 2d 564 (1978); *Appalachian Power Co.*, 253 S.E.2d at 384-85; *see also* 91 Harv.L. Rev. at 1510-13.

[5] The existence of a statute or ordinance mandating notice and a hearing to those persons whose interests are likely to be affected by the decision is a clear signal that the governmental decision is to be regarded as quasi-judicial for the purpose of judicial review under C.R.C.P. 106(a)(4). The fact that there is no such statute or ordinance, however, does not detract from the quasi-judicial nature of the proceeding so long as the decision itself and the underlying process are otherwise consistent with the exercise of quasi-judicial authority, as distinguished from some form of legislative or executive authority. In the absence of legislatively prescribed notice and hearing requirements, it is incumbent upon the gov-

ernmental body to provide adequate notice and an opportunity to be heard to those persons whose protected interests are likely to be affected by the governmental decision. *See, e.g., Eggert*, 647 P.2d at 223; *Juzek*, 225 A.2d at 342.

III.

[6] Turning to the circumstances underlying the adoption of the resolution in this case, we are satisfied that the city exercised a quasi-judicial function in approving the development plan while imposing several restriction thereon and that the city's action satisfied the jurisdictional prerequisites for judicial review under C.R.C.P. 106(a)(4).

It is undisputed that the resolution adversely affected the developer's property interest in making an economic and beneficial use of the land in question. The resolution pertained only to the use of the particular site in question, and was not a decision affecting future land use on a city-wide basis. Moreover, section 6-11-4 of the City Code of Cherry Hills Village sets forth the criteria by which a proposed development site is to be judged. In adopting the resolution, the city applied these criteria to the proposed development plan under consideration, and did so on the basis of facts developed at the several public hearings conducted by the city. The resolution itself was clearly the type of governmental decision that is traditionally associated with quasi-judicial activity.

Furthermore, the city, although not required to do so by either statute or ordinance, provided adequate notice to the developer and other interested persons of the public hearing on the proposed development plan and provided them with an opportunity to present their views on the plan. Both the developer and other members of the public were made fully aware that the purpose of these hearings was to permit the city

to take definitive action on the plan and that approval of the plan would result in the issuance of a building permit for the construction of the project. Since all the requisites for quasi-judicial action were satisfied in this case, the court of appeals erred when it dismissed the appeal on the basis that the city's resolution did not constitute quasi-judicial action for purposes of C.R.C.P. 106(a)(4).

We accordingly reverse the judgement of the court of appeals and remand the case to that court for consideration of the issues raised on the appeal originally filed in that court.

992

CHERRY HILLS RESORT DEVELOPMENT COMPANY, a Colorado limited partnership; Temple H. Buell, as Trustee and beneficiary under the Temple H. Buell Trust, and Richard L. Nathan, as trustee under the Temple H. Buell Trust, Plaintiffs-Appellees,

v.

The CITY OF CHERRY HILLS VILLAGE; the City of Cherry Hills Village City Council; Robert St. Clair, Roy A. Watts, Theodore B. Washburne, George Anderman, Ann M. Polumbus, Donald J. Egan and Merle Chambers, as present members of the City of Cherry Hills Village City Council, Defendants-Appellants,

and

Gary A. Agron and Thomas J. Hilb,
Intervenors-Defendants-Appellants.

No. 83CA0428.

Colorado Court of Appeals,
Div. I.

Feb. 27, 1986.

Rehearing Denied April 10, 1986.

Certiorari Granted (Company)
June 9, 1986.

Village granted preliminary approval of developer's plan for development of re-

993

sort hotel, but specified certain conditions, and developer sought judicial review. The District Court, Arapahoe County, John P. Gately, J., reversed and modified conditions, and village appealed. The Court of Appeals, Pierce, J., held that village resolution giving preliminary approval to developer's plan was neither judicial nor quasi-judicial, and district court had no jurisdiction to review it.

Appeal dismissed; cause remanded.

Constitutional Law 70.1(7)

Zoning and Planning 570

Village resolution giving preliminary approval, with certain conditions, to developer's plans for development of resort hotel was neither judicial nor quasi-judicial, and thus, district court had no jurisdiction to review resolution; neither notice nor hearing were required by local or state law prior to passage of resolution. Rules Civ. Proc., Rule 106(a)(4).

Holme, Roberts & Owen, G. Kevin Conwick, Lawerence L. Levin, Larry S. Schwartz, Amelie A. Buchanan, Englewood, for plaintiff-appellee Cherry Hills Resort Development Co.

Davis, Graham & Stubbs, Robert L. Morris, Edwin G. Winstead, Allen L. Hale, Denver, for defendant-appellant The City of Cherry Hills Village.

Arnold & Porter, Norton F. Tennille, Jr., Andre M. Reiman, Mark H. Boscoe, Denver, for intervenors-defendants-appellants.

PIERCE, Judge.

The Cherry Hills Resort Development Company (developer) submitted to the City of Cherry Hills Village City Council (Village) a master plan containing two alternative plans for the development of a resort hotel. It requested a preliminary approval of either of the plans prior to proceeding with the preparation of its final and complete plans to be ultimately submitted to the Village for approval. Under the Village zoning ordinances, the developer, after receiving such final approval, would have to apply for a building permit.

The Village passed a resolution granting preliminary approval of one of the plans but specified certain conditions. Developer sought judicial review pursuant to C.R.C.P. 106(a)(4). The trial court reversed and modified some of the conditions. The Village initiated this appeal from that ruling.

This court, on its own motion, issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction to review an administrative decision which is neither judicial nor quasi-judicial. Both the Village and developer have responded; two individuals seeking intervention did not respond. We conclude that the resolution passed by the Village was neither judicial nor quasi-judicial, and therefore, the trial court had no jurisdiction to review it under C.R.C.P. 106(a)(4). Accordingly, we dismiss and remand for dismissal of developer's complaint.

The three factors which must exist in order to find that an inferior tribunal has acted in a judicial or quasi-judicial capacity are:

> "1) A state or local law requiring that the body give adequate notice to the community before acting; 2) a state or local law requiring that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and 3) a state or local law requiring the

body to make a determination by applying the facts of a specific case to certain criteria established by law."

Snyder v. Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

It appears that the third requirement is met here. The resolution applies the specific facts presented in developer's plan, it applies the criteria established by the Cherry Hills Village Code, and it concerns primarily the immediate parties. *See City & County of Denver v. Eggert,* 647 P.2d 216 (Colo.1982). However, the requirements concerning legally mandated notice and

994

public hearing were not met in the situation at issue.

Prior to its passage of the resolution, the Village did give notice and did hold a public hearing. However, the developer concedes that such notice and hearing were not required by local or state law. Thus, the first two criteria of the above test have not been met here. Accordingly, the resolution giving preliminary approval to developer's plan is neither judicial nor quasi-judicial. Therefore, the trial court had no jurisdiction to review the resolution under C.R.C.P. 106(a)(4). *Snyder v. Lakewood, supra; Stuart v. Board of County Commissioners,* 699 P.2d 978 (Colo.App.1985).

Developer argues that *City & County of Denver v. Eggert, supra,* provides a second method for establishing the quasi-judicial nature of an administrative action. Specifically, developer argues that if the action has quasi-judicial impact, or is quasi-judicial in nature and effect, then the administrative action is reviewable under C.R.C.P. 106(a)(4). We find no support for this argument in *City & County of Denver v. Eggert, supra,* and are not persuaded by the other authority cited to us.

As a result of our disposition, we need not reach developer's

remaining contentions nor the contentions of the intervenors.

The appeal is dismissed and the cause is remanded with directions to dismiss developer's complaint.

KELLY and BABCOCK, JJ., concur.

DISTRICT COURT
COUNTY OF ARAPAHOE Case No. A82CV603
STATE OF COLORADO

OPINION and RULING

CHERRY HILLS RESORT DEVELOPMENT COMPANY, a Colorado limited partnership, TEMPLE H. BUELL, as Trustee and beneficiary under the Temple H. Buell Trust, and RICHARD L. NATHAN, as Trustee under the Temple H. Buell Trust,

Plaintiffs,

vs

THE CITY OF CHERRY HILLS VILLAGE; THE CITY OF CHERRY HILLS VILLAGE CITY COUNCIL; ROBERT ST. CLAIR, ROY A. WATTS, THEODORE B. WASHBURNE, GEORGE ANDERMAN, ANN M. POLUMBUS, DONALD J. EGAN and MERLE CHAMBERS, as present members of the City of Cherry Hills Village City Council,

Defendants.

THIS MATTER came on for consideration under C.R.C.P. 106 (a) (4), for judicial review of a zoning resolution adopted by the Council of the City of Cherry Hills Village, plaintiffs represented by Richard L. Nathan, Esq., of Greengard, Blackman & Senter, Lawrence L. Levin, Esq. and Larry S.

Schwartz, Esq., of Holme, Roberts & Owen and the defendants represented by Robert L. Morris, Esq. and Timothy M. Tymkovich, Esq. of Davis, Graham & Stubbs.

The Court has considered the record submitted to the Court and the briefs of the parties and, being fully advised in the premises, now issues the following:

OPINION

Plaintiffs submitted to the City of Cherry Hills Village a master plan for the development of a resort hotel and residence project on 68.8 acres located adjacent to and southeast of the intersection of East Hampden Avenue and South University Boulevard. Plaintiffs sought approval of their master plan as a preliminary step to the issuance of a building permit for the project.

-1-

After study of the master plan, the Council of the City of Cherry Hills Village adopted a resolution for approval of the master plan, but imposed a series of conditions and restrictions to its approval of the project.

Plaintiffs then commenced this proceeding under C.R.C.P. 106 (a) (4) to review the conditions and restrictions imposed by the Council, which plaintiffs argue are arbitrary and capricious. Plaintiffs urge that the Council exceeded its jurisdiction and abused its discretion in imposing the conditions and restrictions.

When Cherry Hills Village was incorporated in 1945, the 68.8 acres contained in the master plan of plaintiffs was zoned R-1, a residential district with a minimum lot area of 2½ acres and with single-family dwellings as a permitted use, Section 6-5-1 et seq., Code of the City of Cherry Hills Village.

Ordinance No. 3, Series of 1958 rezoned the 68.8 acres to RA-1, a resort area district. The permitted uses in the RA-1 district are residential and resort hotel and any use permitted in an R-1 2½ acre residential district.

The zoning regulation restricts the area of structures in an RA-1 district to a maximum of 10% of the total land area, Section 6-11-3(B) of the City Code.

In 1970 the Council of Cherry Hills Village enacted Ordinance No. 2 Series of 1970, which requires that the Council approve construction plans before the issuance of a building permit in an RA-1 district. The provision is as follows:

RA-1 -- Resort Area District

E. Plan Approval Required. No building permit shall be issued for any construction within an RA-1 Resort Area District until complete plans are approved (which approval shall not be unreasonably withheld) by the City Council, with the advice of the Planning and Zoning Commission

after consideration of the compatibility of the proposed plans with the City's Master Plan, this Ordinance, and existing structures and uses in the neighboring area. These plans must include location, height, and area of all proposed structures, outdoor signs and lighting, as well as the location and details of recreational areas and all accessory structures and roadways. (Section 6-11-4 of the City Code).

Under said Ordinance No. 2, the City was divided into zoning districts in accordance with a master plan for the physical development of the City and the division was designed:

(a) To lessen congestion in the streets;

(b) To secure safety from fire, panic, flood waters, and other dangers;

(c) To promote health and general welfare;

(d) To provide adequate light and air;

(e) To prevent the overcrowding of land;

(f) To avoid undue concentration of population; and

(g) To facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

Under Ordinance No. 3, Series of 1958, a residential and resort hotel in a RA-1 district is defined as follows:

> Residential and Resort Hotel. For the purposes of this section a residential and resort hotel is defined as a building, or associated group of buildings, designed for the entertainment of transients as guests for compensation, the resident of which are not predominately permanent, (in the sense of continuous, year-round tenancey), and do not have exclusive possession and control of the rented facilities, and the conveniences and facilities of which include, but not by way of limitation, public dining areas, meeting rooms and facilities, retail outlets, room service and housekeeping and maid services. No more than 25% of the rooms available for rent shall have cooking facilities. (Section 6-1-1 of the City Code).

Plaintiffs submitted two master plans to the City for approval. One plan, referred to as the Preferred Plan, required that acreage in excess of 68.8 acres be rezoned from R-1 to RA-1, in order to permit a golf course to be constructed as part of the development project. The other plan, designated as the Conforming Plan, did not require any rezoning of the 68.8 acres that had been zoned as RA-1 in 1958.

The Council acted on the Conforming Plan that provided

for 600 hotel rooms and 200 residences (Record on appeal II(3), Section I, Letter of

Intent, p.1 and Section V, Project Description, p.7). The Conforming Plan complied with the area regulations of Section 6-11-3(B) of the City Code.

In its Resolution No. 5, Series of 1982, the Council approved of the general concept of a resort hotel as set forth in plaintiffs' master plan and indicated that condominiums might be considered favorably when a satisfactory master plan was submitted to the City (Record on Appeal § IV).

By its Resolution No. 16, Series of 1982, the Council preliminarily approved the general concept of the conforming plan, but imposed the following conditions and restrictions to its approval:

Section 2. This preliminary approval is specifically granted subject to the following conditions and restrictions, to-wit:

a. The building heights shall not exceed those represented to the City by the Developer, i.e.: chimney -- 90 feet, highest roof line -- 80 feet; restaurant -- 70 feet.

b. Recreational facilities shall include not less than nine tennis courts, one swimming pool, one outdoor skating rink, health club, and nine-hole executive type golf course.

c. Parking facilities shall include underground parking for at least 1,150 vehicles, and surface parking for not more than 370 vehicles.

d. The main entrance to the hotel shall be from East Hampden Avenue approximately one-half mile east of South University Boulevard. Acceptable emergency access to the project shall be provided from South University Boulevard. Both accesses onto the State Highways shall be approved by the Colorado Department of Highways and the City of Cherry Hills Village.

e. To assist in alleviating traffic congestion, improvements acceptable to the City and the State Highway Department shall be provided at the intersection of South University Boulevard and East Hampden Avenue, with the Developer providing the funding therefor in the amount of not less than Five Hundred Thousand Dollars ($500,000) as represented by the Developer.

f. The nine-hole golf course shall as proposed be provided generally at the northwest area of the project.

g. Developer shall furnish to the City satisfactory evidence including commitments from the appropriate agencies that all water and sewer requirements for the project will be met and complied with.

h. Sound and view impacts upon adjacent

residential properties shall be mitigated by the use of landscaping, berming and other acceptable devices. It is required that the Developer negotiate directly with each individual adjoining property owner to arrive at the most suitable and acceptable plan to minimize to the extent reasonably possible adverse sound and view impacts resulting from the project.

i. This preliminary approval is granted with specific understanding and condition that the City's current Zoning Code does not permit for this project condominiums, timesharing units, luxury residences, or other long-term arrangements in the sense of continuous year-round tenancy.

j. Full and complete compliance by the Developer with all representations, assurances, and proposals set forth in the said Master Plan submitted to the City, except for those inconsistent with this Resolution.

k. The entire project shall not exceed 600 hotel units totaling a maximum 620,000 square feet.

l. Developer shall submit to the City satisfactory evidence of its financial ability to perform and complete the entire project.

m. As claimed by the Developer the proposed

resort hotel shall be of the highest quality comparable to the Mobil Five-Star hotel designation.

n. Retail outlets shall be of the highest quality appropriate to the Mobil Five-Star hotel designation.

o. The pitched roof line and general residential appearance of the buildings as depicted on the model presented to the City Council at its March 2, 1982 meeting shall be maintained.

p. An acceptable Development Agreement shall be entered into between the City and Developer for all public improvements to be constructed or installed, together with acceptable security such as a bond, irrevocable letter of credit, or other mutually acceptable means.

q. All capital or public improvements, including within limitation traffic signals and devices, shall be at

the sole expense of the Developer.

r. Developer shall provide all funds required for additional fire equipment necessitated as a result of the project, as may be reasonably determined by the Cherry Hills Fire Protection District.

s. All non-staff professional engineering and other similar costs incurred by the City in connection with the project, including inspections, approvals, and other similar services, shall be paid for by the Developer.

t. At all stages of the project, Developer shall fully comply with all applicable provisions of the Cherry Hills City Code. (Record on appeal §IV).

Condition a. is in conflict with Section 6-11-3 (A) of the City Code and is arbitrary.

Condition b. is more restrictive than Section 6-11-2 (B) of the City Code. Condition c. is more restrictive than Section 6-15-1 of the City Code. The conditions are arbitrary.

Condition d. is a valid exercise of the police power of the City to lessen congestion in the streets and to promote the public health, safety and general welfare as enumerated in Ordinance No. 2, Series of 1970.

Condition e., in its requirement that the developer fund $500,000.00 for intersection improvements to state highways, is not supported by the zoning regulations of the City. The defendants have not demonstrated any ordinance of statutory authority for condition e. The condition is arbitrary and an abuse of discretion by the Council.

Condition f. is more restrictive than the provisions of Section 6-11-2(B) of the City Code and is arbitrary.

Condition g. complies with the provisions of Ordinance No. 2, Series of 1970, as a valid exercise of the police power of the City to provide for adequate water and sewerage for the project.

Condition h., in its requirement that the developer negotiate di-

rectly with adjoining property owners to arrive at a suitable and acceptable plan, is an abuse of discretion. Only the City Council has the power, authority, duty and responsibility to rezone land within the territorial limits of the municipality, Frankel v. Denver, 147 Colo. 373, 380 (1961), and only the Council of Cherry Hills Village has the authority to apply the provisions of Section 6-11-4 of the City Code to the master plan of plaintiffs. Id. The remaining provisions of condition h., as contained in the first sentence thereof, are a valid exercise of the Council's authority to promote the public health and general welfare as enumerated in Ordinance No. 2, Series of 1970.

Residential and resort hotels and single-family dwellings are permitted uses in an RA-1 district. Condominium ownership of real property is recognized in this state, C.R.S. 38-33-101, et seq. Under the Condominium Ownership Act, single-family dwellings may be constructed as condominiums.

Conditions i. and k. prohibit condominiums in the Conforming Plan. The imposition by the Council of conditions i. and k. is in conflict with the zoning regulations of the City and the Condominium Ownership Act. The Council abused its discretion in imposing conditions i. and k.

Condition j., i.e., full and complete compliance by the developer with all representations, assurances and proposals set forth in the master plan submitted to the City, is a valid condition under Ordinance No. 2, Series of 1970.

The zoning regulations of the City do not support the imposition of conditions l., m. and n. The conditions are arbitrary and the Council abused its discretion in imposing conditions l., m. and n.

Conditions o. and p. are valid conditions under Ordinance No. 2. Series of 1970.

Condition q., i.e., that all capital or public improvements, in-

cluding traffic signals and devices, constructed within the 68.8 acre project, shall be at the sole expense of the developer, is a valid condition under Ordinance No. 2, Series of 1970.

The zoning regulations of the City of not support the imposition of condition r. The defendants have failed to demonstrate any ordinance or statutory authority for condition r. The condition is arbitrary.

Condition s. is a valid condition under Section 6-2-3 of the City Code. The provisions of the City Code determine the costs that are properly chargeable to the developer.

Condition t. is a valid condition under Section 6-11-4 of the City Code.

Property owners have a right to rely on existing zoning regulations when there has been no material change in the character of the neighborhood which may require rezoning in the public interest, Roosevelt v. Englewood, 176 Colo. 576, 581(1971) and when a use is permitted by right in the zone created and either through an environmental concern or a change of circimstances the use is incompatible with prior usage, the proper procedure is to amend the zoning resolution, Western Paving Construction Co. v. County Commissioners, 181 Colo. 77, 81(1973).

The Council preliminarily approved the general concept of the proposed resort hotel as set forth in the Conforming Plan of plaintiffs, Resolution No. 16, Series of 1982, Section 1, but the Council deplored the height and density of the proposed project. Id.

The conditions and restrictions imposed upon plaintiffs by the Council denies to plaintiffs the use of their property for single-family dwellings, as condominiums, a use by right in the

RA-1 district.

Section 6-11-1, et seq. of the City Code of Cherry Hills Village does not constitute a Planned Unit Development ordinance. Inasmuch as

-8-

the Council exercised discretion not afforded to it in its zoning ordinances, it has exceeded its jurisdiction, and its reject of plaintiffs' Conforming Plan is invalid, Bauer v. Wheatridge, 182 Colo. 324, 327(1973), Sherman v. The City of Colorado Springs Planning Commission, __P.2d_(1983) C.C.A., No. 82CA0759.

RULING

The imposition of conditions and restrictions a., b., c., e., f., the second sentence of h., i., k., l., m., n., and r. by the Council of the City of Cherry Hills Village, in its Resolution No. 16, Series of 1982, is reversed.

This matter is remanded to the Council of the City of Cherry Hills Village with directions that the Council shall:

1. Delete from Section 1 of Resolution No. 16, Series of 1982, conditions and restrictions a., b., c., e., f., the second sentence of h., i., k., l., m., n., and r.
2. Modify conditions and restrictions j. and q. in accordance with the views expressed in this opinion.

DONE this 12th, day of March, 1984.

BY THE COURT:

/s/ JOHN P. GATELY

John P. Gately

District Judge

(2)

Supreme Court, U.S.
F I L E D
JUL 26 1996
CLERK

No. 95-2083

In The

Supreme Court of the United States

October Term, 1995

CHERRY HILLS RESORT DEVELOPMENT COMPANY, a Colorado Limited Partnership,

Petitioner,

vs.

THE CITY OF CHERRY HILLS VILLAGE,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT L. MORRIS
Counsel of Record
MORRIS & ASSOCIATES
Attorneys for Respondent
6059 South Quebec Street
Suite 203
Englewood, Colorado 80111
(303) 779-4664

9265
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

13 pp

QUESTION PRESENTED

Should the Court grant certiorari review of a state court factual decision that a plaintiff had failed to prove damages?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations iii

Statement of the Case 1

A. Proceedings Below That Are Not Addressed By The Petition. 2

B. Proceedings Below That Are Addressed By The Petition. 3

Reasons for Denying the Writ 4

I. The decision below does not support jurisdiction under 28 U.S.C. § 1257(a). 4

II. The decision below does not implicate important federal questions so as to justify exercise of this Court's discretionary certiorari review. 5

III. The decision below rests on adequate non-federal grounds so as to prevent discretionary review by this Court. 6

Conclusion 9

Contents

Page

TABLE OF CITATIONS

Case Cited:

Herb v. Pitcairn, 324 U.S. 117 (1954) 6

Statutes Cited:

28 U.S.C. § 1257(a) 1, 4

42 U.S.C. § 1983 ..... 2, 4, 8

Rules Cited:

Supreme Court Rule 10(b) 5

Supreme Court Rule 10(c) 1, 5

C.R.C.P. 106 ..... 2, 3, 4, 7

Respondent requests denial of the petition for certiorari review by this Court of a decision of the Colorado Court of Appeals. The Court of Appeals opinion, which is unreported, is reproduced at Appendix 3a-7a to the petition.

STATEMENT OF THE CASE

Petitioner attempts to justify this Court's acceptance of jurisdiction of the petition under 28 U.S.C. § 1257(a) and exercise of its discretionary powers of certiorari review under Supreme Court Rule 10(c) by characterizing the decision below as one that decided an important and undecided question of federal law and/or decided an important federal question in a way that conflicts with decisions of this Court (Pet. p. 6). In fact, no question of federal law, important or unimportant, decided or undecided by this Court, was decided by the Colorado Court of Appeals. On the contrary, the first phase of the proceedings below (which is much referenced by Petitioner in its petition but is not the subject of the petition for review by this Court) concerned only state court review of a quasi-judicial land development decision by Respondent, a municipality. The second phase (which is addressed by the petition) did concern alleged deprivations of the United States constitutional or statutory rights, but it was resolved against Petitioner in the Colorado Court of Appeals by affirmance of the trial court decision that Petitioner had failed to prove damages flowing from the alleged deprivations, thereby obviating the need for the state appellate court to consider the merit of the trial court's rejection of Petitioner's constitutional and statutory claims. Thus the issues which Petitioner asserts are implicated by the decision below are not appropriate subjects for discretionary certiorari review by this Court in this case, whatever their importance or status in other cases may or may not be.

A. Proceedings Below That Are Not Addressed By The Petition.

Petitioner filed this action in the District Court for Arapahoe County, Colorado, in 1982, seeking certiorari review by that court under C.R.C.P. 106(a)(4) of a quasi-judicial decision by Respondent limiting in certain respects its approval of Petitioner's plan for development of real property. Under C.R.C.P. 106(a)(4), such certiorari review is available where it is claimed that a municipality such as Respondent exceeded its jurisdiction or abused its discretion. Petitioner claimed that Respondent had both exceeded its jurisdiction and abused its discretion by including the limitations in its approval of the development plan. Further, Petitioner asserted damage claims under United States and Colorado constitutional provisions and under 42 U.S.C. § 1983.

The District Court in 1984 entered final judgment in favor of Petitioner on its Rule 106(a)(4) claim as to some but not all of the limitations; it dismissed certain of the damage claims but did not enter final judgment on any of them. Respondent appealed the District Court judgment on the C.R.C.P. 106(a)(4) claim. The Colorado Court of Appeals in 1986 held that the District Court did not have jurisdiction over the Rule 106 claim and directed that the complaint be dismissed. The Colorado Supreme Court reversed, holding that the District Court did have jurisdiction, and remanded the case to the court of appeals to consider the original Rule 106 claim.

On remand the Court of Appeals found in 1988 that Respondent had not exceeded its jurisdiction or abused its discretion within the meaning of Rule 106. The case returned to the Supreme Court, which again reversed, finding in 1990 that certain of the limitations contained in Respondent's approval of Petitioner's development plan exceeded Respondent's jurisdiction or abused its discretion. That decision by the

Colorado Supreme Court concluded the proceedings below relating to Petitioner's Rule 106 claim, and despite the attention given to that phase of the proceedings below in the Petitioner's petition for review by this Court, the petition does not seek review of the Rule 106 claim or the Colorado state court proceedings on that claim.

B. Proceedings Below That Are Addressed By The Petition.

After the 1990 Colorado Supreme Court decision, Petitioner moved in the District Court, based on a change in the law, to reinstate certain of the damage claims premised on the United States Constitution that previously had been dismissed by the District Court. Certain damage claims were reinstated by the District Court. All surviving damage claims were tried in 1992. In 1993 the District Court issued its decision finding against Petitioner on all of its claims of United States and state constitutional or statutory violations and further finding that in any event under Colorado law Petitioner had failed to establish by a preponderance of the evidence that it had sustained any damages flowing from the alleged constitutional and statutory violations.

On appeal, the Colorado Court of Appeals affirmed the decision of the District Court, noting that "[Petitioner] advances the arguments it presented before the trial court in an attempt to have the [Respondent's] actions declared to constitute a taking, to result in damage to the property, and to violate [Petitioner's] right to substantive due process. We do not reach these issues because [Petitioner's] failure to establish that its damages are traceable to, and are the direct result of, the [Respondent's] invalid conditions precludes its recovery of any but nominal damages under all of its various claims."

That is the decision by the Colorado Court of Appeals that

the Colorado Supreme Court, notwithstanding its previous attention to the Rule 106 phase of the case, deemed unworthy of certiorari review. And that is also the decision that Petitioner contends is so important a decision on constitutional and 42 U.S.C. § 1983 issues as to authorize and compel this Court to grant certiorari review.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT SUPPORT JURISDICTION UNDER 28 U.S.C. § 1257(a).

28 U.S.C. § 1257(a) allows certiorari review by this Court only in limited circumstances, *viz.*, for purposes of this petition, where a state court decision draws in question the validity of a United States statute or a right is specially set up or claimed under the United States Constitution or statute. Petitioner claimed deprivation of United States constitutional rights and violation of 42 U.S.C. § 1983, but those claims, *albeit* addressed and rejected by the trial court, were not addressed by the Court of Appeals, which sustained the trial court's alternative basis for decision, *i.e.*, that Petitioner had failed to meet its burden of proof of any damages flowing from any of the claims. Thus Respondent submits that the decision below did not draw into question the validity of 42 U.S.C. § 1983 or address any right claimed under either § 1983 or any United States constitutional provision.

II.

THE DECISION BELOW DOES NOT IMPLICATE IMPORTANT FEDERAL QUESTIONS SO AS TO JUSTIFY EXERCISE OF THIS COURT'S DISCRETIONARY CERTIORARI REVIEW.

Implicitly recognizing that the decision below is little more than a fact-based determination of the sufficiency of evidence at the trial court level to meet the state law requirements for proof of damages flowing from alleged wrongs, Petitioner begins its argument (Pet. p. 6) by invoking Supreme Court Rule 10(c)[1] references to state court decisions of important federal questions and then (Pet. pp. 6-7) characterizing the decision below as one that "presents the opportunity to answer significant and recurring questions" and "raises issues related to the application of this Court's decisions" and "raises issues surrounding 'substantive due process' claims in land use cases brought under 42 U.S.C. § 1983 this Court sought to resolve" in a case in which certiorari review was first granted and then dismissed as improvidently granted.

It appears that not even Petitioner can bring itself to say that the Colorado Court of Appeals actually "decided" an important federal question that has not been but should be settled by this Court or that it actually "decided" an important question in a way that conflicts with relevant decisions of this Court. Indeed, not even in Petitioner's argument on the five different (*albeit* largely overlapping) "Questions Presented" does Petitioner actually assert that such a "decision" was made by the court below. Rather, Petitioner seems to believe that if it can bring some aspect of the proceeding below within the aura of this Court's

---

1. The citation in Petitioner's brief is to Supreme Court Rule 10(b), but the language of the rule relied upon is contained in Rule 10(c) (*see* Pet. p. 6).

concern about local governmental acts affecting rights in real property emanating from the penumbra of recent land use decisions of this Court, it can fool this Court into thinking that the decision below cries out for review by this Court. This case may touch upon issues of current concern to this Court, but it is not one that justifies review by this Court. No federal question was decided, certainly none of such importance that this Court should expend any of its discretionary review on it.

III.

THE DECISION BELOW RESTS ON ADEQUATE NON-FEDERAL GROUNDS SO AS TO PREVENT DISCRETIONARY REVIEW BY THIS COURT.

Whether or not the decision below decides a federal question, and whether or not that question is important and either undecided by this Court or already decided by this Court, certiorari review is not granted where the decision below rests on adequate non-federal grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1954). The decision of the Colorado Court of Appeals did not address the federal questions arguably implicated in the proceedings below, but even if that court, like the District Court, had addressed and rejected them, or if the District Court were viewed as the "highest court" of Colorado for purposes of certiorari review in this instance, the decision below nonetheless would rest on adequate non-federal grounds.

The non-federal ground is the failure of Petitioner to meet its burden of proof of any damages flowing from any of the alleged constitutional or statutory wrongs. The factual finding of the District Court, sustained by the Court of Appeals, was that none of the losses sustained by Petitioner, whether out-of-pocket expenses or lost profits or otherwise, had been shown, as required by Colorado law, by a preponderance of the evidence,

with reasonable certainty, to be traceable to and the direct result of any of the alleged wrongs (Court of Appeals Opinion at Appendix 5a-6a; *see also* District Court Opinion at Appendix 64a-68a). As the Court of Appeals noted (Appendix 6a):

> The trial court, upon thorough consideration and with record support, determined that [Petitioner] did not establish by a preponderance of the evidence that it would ever have been able to obtain financing for the project,[2] or that it would realize any profit from the project. Although the court considered the measure of damages for each of [Petitioner's] claims, it ultimately concluded that the restrictive conditions did not cause any loss to [Petitioner]. Neither the restrictions nor the pending lawsuit caused the project to remain unfinanced and undeveloped.

Petitioner attempts to circumvent this obvious and insurmountable barrier to review by arguing (Pet. p. 9) that the proof of damage issues are "false issues" since the Colorado Supreme Court, in the Rule 106 phase of the proceedings below, found that Respondent had acted improperly in imposing certain of the conditions, and "This being so, of what possible legal significance could the inquiry into Petitioner's ability to develop the property subject to the unlawful conditions be?" That question begs the question. It needs no citation of authority to say

---

2. *See* discussion of "Financing" by District Court at Appendix 27a-35a. *See also* summary conclusion of District Court at Appendix 68a: "Finally, the Court has concluded that the restrictive conditions did not cause any loss to the [Petitioner]. Neither the restrictive conditions nor the pending lawsuit caused the project to remain unfinanced and undeveloped."

that except in limited circumstances such as "libel per se," damages must be shown to flow from wrongs in order to recover damages.

Petitioner further attempts to avoid the "adequate non-federal grounds" barrier to its petition by asserting (Pet. 14-16) that in an action under 42 U.S.C. § 1983,[3] out-of-pocket losses are recoverable.[4] It doesn't matter whether they are or aren't, given the District Court findings that Petitioner failed to prove the wrongful actions of the City caused the failure of the project and that the failure of the project caused any damages sustained by Petitioner.

Failure of proof of any damages, whatever the measure, attributable to alleged federal constitutional or statutory wrongs clearly constitutes an adequate non-federal ground for decision and mandates that this Court decline to exercise its discretion to review the decision of the Colorado courts.

---

3. In the Court of Appeals, Respondent contended that there was no substantive due process claim under § 1983 in the case. The Court of Appeals, of course, did not reach that argument by Respondent since it upheld the trial court finding of no damages of any sort attributable to the wrongs claimed.

4. It is true that the District Court concluded that out-of-pocket expenses are not recoverable as damages under either a taking claim or a § 1983 claim. *See* Appendix 67a.

CONCLUSION

The petition makes much ado about nothing of concern to this Court. It should be denied.

Respectfully submitted,

ROBERT L. MORRIS
Counsel of Record
MORRIS & ASSOCIATES
Attorneys for Respondent
6059 South Quebec Street
Suite 203
Englewood, Colorado 80111
(303) 779-4664